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Study of Civil Justice in New York

IT would be hard to imagine a more carefully or a more ably planned campaign to get the facts about the administration of justice than that outlined in the pamphlet, "Study of Civil Justice in New York," recently issued by the Institute of Law of the Johns Hopkins University. One realizes, perhaps for the first time, as a result of this precise and illuminating document, how important it is to have a definite idea of the entire field and to select, out of the many subjects which present themselves for treatment, those which seem to offer probabilities of the most significant results. Certain of the inquiries mentioned in the publication are termed "strategic" and the expression is well chosen. When a definite position is once gained and consolidated in respect to them, it will be easy from such vantage points to reduce many minor positions to intelligibility and coherency.

Readers will recall, as stated in the Foreword to this pamphlet, that "about two years ago the Institute of Law of the Johns Hopkins University undertook, as one of its major efforts, the study of some problems in the administration of Justice in New York. But for concrete data upon which to base further studies and conclusions it was not content to place its whole reliance on more formal court records, which after all report, and that briefly and inadequately, a mere phase of the whole process of administering justice. Considering the process as a whole, it decided to enlist the help of the lawyers themselves, who are concerned in the conduct of actual litigation from the beginning to the end, and whose own records constitute an invaluable mass of material capable of statistical treatment. In brief, its study was to be the life history of a large number of actual pieces of litigation and the parts of it which were significant for the improvement of the administration of justice were to be determined with the greatest possible exactness.

"If the life history of a piece of litigation is thought of as represented by a foot rule," the pamphlet states, "the first task is to locate (and to measure) defects and difficulties within the inches. Thereafter the task is to locate and measure them more and more exactly and to ascertain causes within the smaller and smaller parts of those inches wherein the trouble has been found, those parts of the ruler disclosing no difficulties being thereafter neglected." The undertaking along these lines has evidently appealed to the lawyers of New York since, as we are told, "more than 1,750 members of the New York Bar have expended much care and effort furnishing the mass of invaluable material contained in over 5500 detailed reports of actual pieces of litigation now on hand." These reports are all concerned with that portion of civil justice covered by civil actions at law.

Under the title of "The Basis of the Program" the Institute's report states that "there are three master facts in the present situation which underlie the choice of the group of key problems and about which they all cluster. The study of available data shows: *first,* that, of the combined stream of civil actions flowing into the Supreme, City and Municipal Courts in New York City, clearly more than a half is collection litigation involving sales, loans, services or rent and something like a third is accident litigation, fully five-sixths of the whole being thus accounted for; *second,* that, of all civil actions brought in these courts, certainly less than a fifth and probably not much more than an eighth is disposed of by trial, much less of the collection than of the accident litigation being so disposed of; and *third,* that, of the cases disposed of without trial, which is the neck of the bottle, a substantial portion is not

eliminated until after a wait for trial ranging, as indicated in *Table 2*, from three weeks to three years.

"Since then negligence and collection litigation constitutes some five-sixths of all civil actions, if it could be so treated as to be eliminated or promptly disposed of, court congestion and delay would largely disappear, with costs and uncertainty reduced. The problem is how these bodies of litigation can be handled fairly and expeditiously without closing the courts to them. Specifically this involves the following hypotheses for study:

"1. That the number of groundless accident *cases brought* and the number of groundless *defenses asserted* in collection cases should be reduced. The unprofitableness of these angles of litigation needs to be shown or provided.

"2. Much collection litigation now lends itself to ministerial treatment. Such treatment of collection litigation needs to be made more general and more expeditious. Its other broad problems relate to collecting judgments.

"3. Much of the accident litigation entitled to be brought, which can be disposed of without trial, should be so disposed of earlier than at present. As to the portion requiring trial, its dominant questions relate to jury trials, perjury, expert testimony and contributory negligence.

"4. A most substantial and readily alterable factor adversely conditioning the functioning of courts is lack of the proper housing, modern organization and facilities."

We are further told that "the list of key problems into which all the foregoing has translated itself is made up of three groups of inquiries:

"The first is a foundation group of three exploratory studies, the continuation of which is necessary to afford the basis for more and more detailed measured judgments as to the seriousness of delay, expense and uncertainty in litigation and as to their exact location and cause. There is a constant need for increasingly accurate and specific knowledge of the actual present conditions.

"The second group is the major group of key studies. It is divided into two parts:

"a. Four strategic inquiries, having the twofold purpose of getting accurate knowledge of the types and sub-types of litigation with which the courts are at present congested, and of weighing means, compatible with the dictates of justice, of substantially reducing the number of suits instituted and defenses set up;

"b. Five crucial studies having the double purpose of identifying cases and defenses not requiring or not meriting extended treatment at the hands of the courts, and considering fair and effective measures for their earlier elimination.

"The third group of studies consists of three: collection of judgments; jury trials; and housing and facilities for judicial business. These studies, while inter-tied with those in the Major Group (in that they are aimed at understanding and improving the handling of cases which are entitled to be brought and to remain in the courts for full examination on their merits), stand on a somewhat different footing. They are problems chosen because of their conspicuous importance apart from their relation to the general plan of study."

It is impossible here to go into the details of the studies as given in the pamphlet, but the following statement with regard to one of the exploratory inquiries, that on "Uncertainty of Outcome of Litigation," is given as showing the way in which the subject is broken up for special and detailed examination.

"The study which is facing the common complaint as to the uncertainty of the outcome of litigation has the two-fold aim of learning the degree of truth in this charge and of determining as exactly as possible when and where factors producing uncertainty enter.

"This involves identifying and setting to one side those classes of cases, such as small loan and foreclosure litigation, the outcome in a great mass of which is not at all uncertain. It involves also a study of uncertainty subsequent to judgment to determine the varying proportion of appeals and reversals in the different kinds of cases and to isolate the varying causes of such diversity in the number and outcome of appeals.

"As to the uncertainty of outcome prior to judgment, the gross figures showing that plaintiffs win in from some 60 to 70 per cent of the general run of cases have to be broken down into detailed figures for different classes of litigation, courts, parties, etc., and a number of these categories must be examined in relation to those factors introducing uncertainty which the study has thrown up as the most important ones. Among such factors, those chosen for special attention are:

"1. Uncertainty as to the exact time when a case will be tried. The study of this matter is tied up with that of calendar practices described below. (p. 31.)

"2. Uncertainty as to the issue upon which the trial will turn. This matter forms a part of the study of earlier and fuller definition of issues and disclosure of evidence to be adduced, which is outlined below. (p. 29.)

"3. Uncertainty of outcome resulting from perjury. This study involves ascertaining the types of cases in which perjury is most common; its effect on the outcome in the mass of each of such types; the relative immunity of judge and jury to its effect on their respective decisions in different kinds of cases; the causes of the ineffectiveness of present rules and devices designed to prevent (or punish) perjury; and, more generally and more important, what it is about the whole set-up of the trial that results in so many people, who are careful of the truth in the other human relations and on other occasions, taking liberties with it on the witness stand. Valuable material for this study is at hand in the reports of cases from lawyers, but special collections of data will need to be made for certain kinds of litigation.

"4. Uncertainty caused by some rules of evidence. A limited number of the rules of evidence most commonly criticized, such as those relating to impeaching one's own witness and non-experts stating opinions based on personal knowledge, require study to see how they work in practice, why they persist in the face of long-standing criticism and which of the numerous changes in them that have been suggested fit the facts.

"5. Uncertainty as to proof of technical issues by expert testimony. The study of this matter, on which our reports of cases contain information, covers the practical effects and actual utility of

expert testimony, difficulties as to experts attending trials and proposals that the court have its own expert. The cost of expert testimony falls under the study of cost generally."

National Commission on Law Observance and Enforcement Completes Work

FOURTEEN reports, containing 4,023 printed pages and aggregating about 1,600,000 words, represent the printed record of the work of the National Commission on Law Observance and Enforcement, which came to an official end on June 30. The last report to be sent to Preident Hoover was that on "Crime and the Foreign Born," which is dated June 24, 1931.

The expert in charge of this particular inquiry was Dr. Edith Abbott, dean of the Graduate School of Social Service Administration of the University of Chicago, and she was assisted by a number of scholars with special qualifications in the particular field to be studied. Her report, according to the brief preliminary statement signed by the Commission, "contains an introductory statement with regard to the scope of the inquiry. This is followed by a critical and historical survey of public opinion from colonial to modern times, with regard to crime and the foreign born, leading to certain historical conclusions. Part II of the report, by Miss Bowler, surveys recent statistics of crime and the foreign born and attempts to draw such conclusions as are possible in view of the general inadequacy of the available statistics. Part III of the report, by Doctor Taylor, Dr. Handman and Mr. Warnshuis, considers crime and criminal justice as presented by the Mexican immigrants to the United States. Part IV presents three community studies—crime and the foreign born in New Orleans, San Francisco and Stockton, Cal. Part V of the report contains the general conclusions which Miss Abbott thinks justified by her own studies and those of her associates. . ."

One of the conclusions relates to the relative proportion of crime among the foreign born and native born, and on this interesting subject the Commission thus summarizes: "It is important to observe that the study made by Miss Abbott and her associates is, for the most part, limited to the foreign born, strictly so called. It does not cover the prevalence of or tendency to crime among American-born descendants of parents, one or both of whom are foreign born. Crime statistics can hardly be said to have attempted to segregate and compile the data necessary for any inquiry as to the latter group. Whether or not the current impression of excessive criminal propensities among so-called 'foreigners' generally, can partially be justified by the existence of criminal propensities among children of foreign born parents, it is impossible either to affirm or deny. Within the limits of the problem which it has been possible to study, we are now in a position definitely to say that any such impression as to the foreign born is at variance with the facts. The conclusions reached by Miss Bowler, from her statistical studies, are that in proportion to their respective numbers the foreign born commit considerably fewer crimes than the native born; that the foreign born approach the record of the native born most closely in the commission of crimes involving personal violence, and that in crimes for gain the native born greatly exceed the foreign born."

The complete list of the Reports submitted by the Commission is as follows: 1—Preliminary Report on Observance and Enforcement of Prohibition; 2—Report on Enforcement of Prohibition; 3—Criminal Statistics; 4—Prosecution; 5—Enforcement of the Deportation Laws of the United States; 6—The Child Offender in the Federal System of Justice; 7—Progress Report on the Study of the Federal Courts; 8—Criminal Procedure; 9—Penal Institutions, Probation and Parole; 10—Crime and the Foreign Born; 11—Lawlessness in Law Enforcement; 12—The Cost of Crime; 13—The Causes of Crime (2 vols.); 14—Police. Any of these Reports may be obtained from the Superintendent of Documents, Washington, D. C., for a nominal price. The Journal expects to present critical articles on these reports in future issues.

Alabama Legislature Strengthens State Bar Laws

THE laws relating to the Alabama State Bar Association were strengthened very substantially by four measures passed at the recent session of the Legislature of that State, according to a communication received from Mr. Borden Burr, the new President of the Association. At the time the State Bar Integration Act was passed in Alabama it was found necessary to make certain compromises and concessions in order to secure legislative approval. That this was good tactics is shown by the legislative willingness, after a few years of experience with the new plan, to make changes desired by the Bar.

The first of the four measures removes the restrictions of the former law which prevented the Board from having entire charge and authority over admissions to the Bar. Under the amended act, the Board of Commissioners now has complete and entire power "to determine by rules the qualifications and requirements for admission to the practice of law."

The second measure removes certain handicaps under which the Board of Commissioners, as well as branch and local associations, labored when they undertook disciplinary action under the old law. That law, among other things, required the giving of security for costs on the filing of complaints, leaving those who filed or participated in the prosecution of the complaints liable to the threat of civil actions for damages, and did not sufficiently provide for the taking of testimony. The amendment to the act corrects these defects in the law by authorizing any grievance committee to institute and prosecute complaints without security for costs and relieves any lawyer participating from any claim or liability for damages on account of instituting or prosecuting the complaint. It also empowers the taking of depositions in accordance with chancery practice, the subpoenaing of witnesses either by personal service or by registered mail, and the employment by the Board of Commissioners, where necessary, of attorneys for the purpose of prosecuting complaints.

The third act is a careful repealer of all old sections of the code and of the former State Bar Act in conflict with the State Bar Act as amended,

and the fourth is an act to further regulate the practice of law, providing who may practice law, defining the practice of law, requiring a license for the practice law, and providing penalties for the violation of the act. The purpose of this act is to restrict along fair lines the many encroachments upon the practice of law by commercial collection corporations, trust companies and other lay agencies.

Questions Discussed by the "International Union of Lawyers"

CREATION of a fund to provide old-age pensions for retired lawyers, and legislative provisions making it a crime to perform any act likely to incite war, were among the interesting subjects discussed at the third annual meeting of the "Union Internationale Des Avocats" (International Union of Lawyers), held at Luxemburg, May 14 to 17, 1931. Mr. Pendleton Beckley, a member of the American Bar Association, residing in Paris, attended as Observer for the Association and has filed a report to the Executive Committee giving the results of the discussion of these as well as other questions considered at the conference.

Fourteen countries were represented. The conference was opened by the Minister of Justice of Luxemburg, who welcomed the delegates to the Duchy and expressed the hope of the Grand Duchess, himself and the Bar of Luxemburg that it would prove eminently successful. The response was made by Bâtonnier Crokaert, President of the Union. The first matter taken up was a report on the question of the creation of international mixed tribunals, intrusted with the duty of passing upon controversies of a commercial character between the nationals of those countries which have accepted their jurisdiction. This report was referred to the affiliated countries for study, with a view to adoption or modification at the next meeting. Another question considered was the introduction into national Codes of provisions making it a crime to perform any act likely to incite war. The Observer's report on this was as follows:

"The discussion of this important and delicate suggestion was led by Maitre Jean Appleton, who took the position that, as lawyers in all countries were representatives of law and order, they should be the first to find some method of placing upon the Statute Books of all countries a provision looking to the prevention of war. He stated that the Codes of Laws of France, England, Germany, and China now contain provisions to the effect that any one who tries to incite a war of aggression by word, book, picture, or in any manner, is guilty of an offense punishable under the Penal Code. He considered it highly desirable that the aid of the 'Union Internationale des Avocats' be placed behind these countries in order to make such provisions international. There was much discussion of this suggestion, many delegates taking part in the debate. The objections seemed to be concentrated on the difficulty of distinguishing between the international and the national law.

"Changes in the report and resolution were urged by Maitre Stefanovitch, of Jugo-Slavia, and Dr. Telders, of Holland. Maitre La Fontaine, of Belgium, feared that action in this matter by the 'Union Internationale des Avocats' might have the effect of causing a conflict with the function and activity of the League of Nations. After changes in the Resolution had been made, which left the matter as establishing merely the principles involved, the same was adopted by a vote of seven (7) nations to four (4). Those voting for the Resolution were: France, Belgium, Switzerland, Czecho-Slovakia, Jugo-Slavia, Poland, and Luxemburg. Those voting against the Resolution were: Germany, Austria, Holland, and Bulgaria."

There was a debate on the report of a Special Committee on "the institution into national legislative bodies of a judicial or administrative tribunal, the purpose of which shall be to pass upon the expulsion of foreigners." The Observer notes that "this matter had an undercurrent of great importance, by reason of the fact that many of the countries which had imported laborers from other countries to work in the mills or the mines now find themselves, in view of depressed conditions, under the necessity of returning them to their native countries." It was decided that each delegate should study the report in relation to the laws of his own country and report to the next meeting as to the advisability of the adoption of a uniform law on the subject. A resolution asserting that the "exercise of free defense for anyone accused" is a natural and inalienable right, that it should always be surrounded with the guarantees necessary to its entire application and extended to all branches of penal or disciplinary repression, was unanimously adopted. The question of "the organization of a certain fund to create old-age pensions for retired lawyers" was then taken up. The Observer reports on this as follows:

"Maître Danaïloff, Chairman of the Bulgarian Committee, then read his report, which had been prepared by the Commission composed of Messrs. Dittenberger (Germany), Rubio Fernandez (Spain), Rodanet (France), and Nyulanzi (Hungary). As a supplement to the report, Maitre Dittenberger, who was a member of the Commission from Germany, offered a report on the present laws in that country with relation to State insurance and State pension for lawyers. The debate on this question was most interesting because of the points of view expressed. Some countries showed, in their laws, a belief in the propriety of aiding the lawyers by old-age pensions and insurance provisions. The delegates from other countries expressed the view that if lawyers could not make a satisfactory living in the practice of their profession, they should choose or select a more congenial occupation.

"Maître Pfeiffer, formerly a Bâtonnier from Vienna, stated that in Austria a law existed under which a lawyer received a pension on reaching a certain age. Maître Hennbicq, speaking on behalf of Belgium, stated that there was no provision for either pension or insurance for lawyers in that country, that in Belgium the practice of the law was considered as an individual attribute, and the Bar itself was, in his opinion, not in accord with any form of subsidy. The Bâtonnier Crokaert in further explanation of the Belgian position, stated that the Bar in Belgium was a small Bar, and therefore the need of pensions and insurances in his country was not as great as in other countries, although he himself felt that in certain cases a pension or insur-

ance might have been desirable.

"Maître Appleton explained the system in France, and stated that it had worked so satisfactorily that he felt sure that no one would wish to be without it. Maître Telders, the Chairman of the Dutch Delegation, stated that their view was the same as that expressed by Belgium, and that he did not think that any such legislation would be favorably considered. Maître Brasseur, for the Luxemburg Bar, stated that this matter was now having the consideration of the Bar, and it is likely that some system similar to that which has worked so satisfactorily in France, would be adopted in the future. Maître Rowinsky, of Poland, reported that there was no such law in his country, but that he would be glad to study this question and especially the report submitted to the Conference. Maître Coquoz stated that Switzerland has no such pension or insurance law, and that each Bar of the twenty-five Cantons arranged to aid their brother lawyers in their own manner.

"In view of the divergence of opinion, it was decided that further study was necessary."

It was decided to give further consideration to the question of permitting the members of the Bar from other countries to plead, on certain occasions, in the courts of a foreign country with the assistance of a member of the Bar of the latter country. "It was the consensus of opinion," writes Mr. Beckley, "that in the development of international comity lawyers should be the first persons to recognize the character and work of their brother lawyers and should do all in their power to break down the artificial barriers of the practice of law." A commission was appointed to make a report at the next meeting on the question of the introduction into national legislation of a provision imposing upon newly naturalized citizens a supplementary stay for the "exercise of the profession of lawyers." The following were then elected as officers: President, Bâtonnier Brasseur, Luxemburg; Vice-Presidents, Danailoff, Bulgaria; Appleton, France; Telders, Holland.

Fragment of the Grotius Memorial Window recently dedicated in the New Church at Delft, Holland. The subjects of the panels shown are "Justification of his embassy to Christina of Sweden" and "Dies at Rostock, in the presence of Minister Quistorpius."

Hon. Frank B. Kellogg Unveils Grotius Memorial Window

HON. FRANK B. KELLOGG, representing the American Bar, unveiled the Grotius Memorial Window at the Nieuwe Kerk at Delft, Holland, on August 25, to the strains of the American national hymn. Thirty members of the Holland Society of New York attended the ceremony and a letter from Governor Roosevelt of New York was read by W. Gorham Rice, Vice-President of the Netherland-America Foundation of New York. Addresses were made by W. Wisagane, President of the Board of Trustees of the Foundation and by J. C. Van Woerden, warden of the New Church at Delft, who accepted the memorial. The window is simple but effective in design and depicts various events in the life of Hugo Grotius, often called "the father of international law." It was presented by the Netherland-America Foundation to commemorate the three hundredth anniversary of the publication of Grotius' great work "De Jure Belli ac Pacis." The fund was raised principally from the American Bench and Bar, under the auspices of the Foundation.

Plans to Protect Clients Against Solicitors' Defaults

THAT the subject of some provision to protect clients from losses due to the defaults of solicitors is still a live one with that branch of the profession in England is shown by the Annual Report of the Council of the Law Society, which was presented to the members on July 10 of the present year.

After reviewing the steps which had been taken during the previous year to deal with the situation, it gives a brief summary of the provisions of the Bill as proposed by the Council in 1930. This provided for compulsory membership in the Law So-

ciety of every person whose name was upon the Roll of Solicitors and, furthermore, "contained a provision also to enable the Society to set apart from its annual income such a sum or sums as the Council might from time to time determine, for the purpose of making such grants as might be deemed necessary or desirable to relieve persons who might suffer hardship as the result of the defaults of any solicitor. The Bill provided, further, that the Society, with the concurrence of the Master of the Rolls from time to time, should make rules for the professional etiquette and discipline of solicitors, particularly (a) as to the opening and keeping of banking accounts into which clients' money should be paid, and as to the conditions under which such accounts should be operated; and (b) as to the keeping by solicitors of accounts containing such particulars and information as to clients' moneys as might be prescribed by the rules, which might provide that any neglect or failure to observe or comply with any particular provision or provisions of any such rules should be deemed professional misconduct."

The Bill, as drafted, was adopted at the Annual General Meeting of the Society last year, we are told, with the exception of the clauses referring to the keeping of accounts. The Council accepted these omissions because it considered that such a course would not interfere with the main principle of the Bill, and had the measure introduced in the House of Commons. The action, however, caused dissatisfaction to a member of the Council, Sir John Withers, who resigned and caused a separate Bill to be introduced in the House "making provision that clients' money should be paid into a clients' account at the bank and that such moneys should not be drawn upon except to meet clients' obligations and that the moneys in the account at all times should be at least equal to the total sum held by the solicitor for any of his clients. The Bill provided also that every practising solicitor should keep proper books of account and as a condition of the issue to him of a practising certificate should produce a certificate from a qualified accountant that he had complied with the provisions of the Bill."

Both measures were up in the House of Commons in 1931 but neither has been finally acted on up to the present. Conferences have been held with a view to adjusting differences and clearing the way for parliamentary action.

The Latest in the "Cannon Case" in Wisconsin

THE latest development in Wisconsin's legal "cause célèbre," the Cannon case, is the refusal of Judge W. R. Foley of Superior to pass upon the question of the validity of the legislative act restoring to Mr. Cannon the right to practice law in spite of the fact that his application for reinstatement was at the time pending before the State Supreme Court. He held that under the circumstances he could not properly act in the matter and that the question was one for the Supreme Court, before whom the application for reinstatement is still pending, to consider and settle. His decision was in connection with a motion made in a certain case to quash the summons and complaint on the ground that Raymond J. Cannon, who appeared therein as attorney, was not entitled to practice law. The motion was made expressly to test the constitutionality of the legislative act, and Judge Foley denied it "without prejudice to the end that the motion may be renewed," if future developments justify that course. We reprint a portion of his memorandum opinion as it appears in a Wisconsin newspaper. It may be suggested in this connection that many lawyers are of the opinion that in certain final comments it fails to attach the necessary significance to the constitutional grant of judicial power to the Supreme Court and other courts in Wisconsin:

"As an original proposition I would have thought that under the Wisconsin constitution the legislature had the power to admit an individual to practice law as an attorney.

"However, in the Cannon case, 196 Wisconsin 534, it was decided by the Supreme Court that the power to admit and disbar attorneys was one vested entirely in the court, and that the legislature was wholly without power or authority in the matter.

"The decision of the Supreme Court constitutes the law which the circuit court must follow and enforce, and were it not for other considerations, which will now be stated, defendant's motion should be granted.

"1. Upon the hearing of this motion proof was made that the matter of restoring Mr. Cannon's license as an attorney is now pending before the Supreme Court upon his petition, which the Supreme Court has entertained and upon which it has taken steps to act.

"2. Beginning in 1849 the legislature had at various times passed laws (nine or ten in number), providing for the admission and disbarment of attorneys, and the Supreme Court has accepted, acted upon, administered and enforced every one of them except Chapter 50, laws of 1855, which provided for the admission of non-residents, and which law was held invalid on the grounds that attorneys are officers of the court and quasi officers of the state and therefore must be residents of the state.

"True, the right of the legislature to legislate on this subject has not always been recognized by the court, but whether through recognition of legislative power or 'through deference to the wishes of co-ordinate branch of the government,' the fact remains that the Supreme Court has given effect to the laws heretofore enacted by the legislature on this subject.

"Certainly the court has not always treated the power of the legislature to enact the law as the controlling consideration. The Supreme Court may or may not accept and give effect to Chapter 480, laws of 1931. At any rate it seems clear to me that the question is one for the Supreme Court to decide in the application of Cannon now pending before it, and that under the circumstances this court should not pass on the question as to whether this law shall be given effect.

"Defendant's motion should be denied without prejudice to the end that the motion may be renewed. In any event I think the service of the summons should not be quashed if Cannon is held not to be an attorney, without giving plaintiff leave

to supply the defect by substituting the name of a qualified attorney.

"In view of some observations made on the argument concerning the decision in the Cannon case (196 Wisconsin 534), I think something further should be said. In that case the Supreme Court asserted that it possessed power not derived from the constitution or the statutes of this state. There is no doubt that such extra-constitutional power is claimed by the Supreme Court in that case. The claim is industriously and obtrusively asserted.

"I think it an astounding claim; a monstrous doctrine.

"If the Supreme Court has power outside of and beyond the constitution and statutes of the state, then its power is unlimited. That means autocracy, and the result of the exercise of autocratic power, unless successively challenged, has always been tyranny. No such extra-constitutional power is necessary to the courts and no such power rightfully exists in the court.

"This unjustified claim of power on the part of the Supreme Court received adequate treatment and complete refutation in the opinion of Mr. Justice Crownhart in the Cannon case. I have mentioned the matter here because I feel that such claim of autocratic power should not be passed in silence, and should be challenged whenever and wherever made."

Translation of "Las Siete Partidas" at Last Published

A NEWS event, unique in character and of real significance, is the publication of "Las Siete Partidas" by the Commerce Clearing House, Loose Leaf Service Division of The Corporation Trust Company of New York, for the Comparative Law Bureau of the American Bar Association.

It will be recalled that the translation, by Samuel Parsons Scott, remained unpublished for years because of the difficulty which the Comparative Law Bureau found in securing funds for the enterprise. Finally Mr. KixMiller, president of the Commerce Clearing House and a member of the American Bar Association, offered to publish it for the Bureau. A copy of it has just been received. It is a large volume, excellently printed on good paper, and the fact that it contains 1,505 pages sufficiently attests the magnitude of the task which has just been brought to a successful conclusion. The Introduction, Table of Contents and Index are by Hon. Charles Summer Lobingier, and there is a Bibliography by Mr. John Vance, Law Librarian of Congress.

The program of the meeting of the Comparative Law Bureau at Atlantic City largely revolved around this work, which is now presented in complete form to American and English readers. The program appeared in the September issue of the JOURNAL.

The Spanish Revolution in a Spanish Law Review

IT could hardly be expected that the revolution in Spain would not find echoes in the "General Review of Legislation and Jurisprudence," official organ of the Royal Academy devoted to those subjects. The "Cronica Juridica" department makes certain comments on "The Project of the Constitution," the editor stating emphatically that he speaks "on my own account and risk. More risk than account."

He points out that the truly central point in contemporary constitutions is "the definition of the attributes of the Government and the determination of its limits in relation with the powers of the Parliament"—in other words the relations of the Executive and Legislative powers. He criticizes the "political legislators" for contenting themselves with making with respect to them vague and indefinite declarations and devoting their attention to other merely dogmatic problems which have already been settled in the field of doctrine. This attitude reminds him of the "mighty lance strokes with which facile heroes combat the dead Moors."

The first article is entitled "Communist Associations," and asks whether they should be considered legal? It points out, in various quotations from communist sources, that communism relies solely on the employment of terror for its ultimate triumph, and concludes with the following, sufficiently expressive of the author's views: "Liberty for the citizen and the foreigner but not for the delinquent; liberty for the unfolding and enjoyment of a peaceful future, but not to prepare us for a violent revolution; liberty for the reign of justice, but not for the hatred of classes; liberty to choose the government, not to establish tyranny."

There is also a long article by a Mexican jurist discussing various constitutional questions, with a view to their significance for the solution of the Spanish constitutional problem. In his opinion, one of the greatest perils which the consolidation of the Republican triumph is likely to run is the danger that the constituent assembly may "lose itself in fascinating and long debates"—thus prolonging the period of ambiguity and uncertainty. He points out the additional danger that in making the Constitution the legislators may show a tendency to fill it so full of details that it will approximate an ordinary code. The constitutional legislator, he says, should remember to make its expressions general and broad, leaving their development to "secondary law." In the matter of decentralization, he warns against a blind imitation of foreign models and emphasizes the necessity of giving full consideration to national historical factors. He also touches upon the limitation of powers of the various branches of the government, and this leads to a full consideration of the "writ of amparo," which is the Mexican judicial method for securing to the individual his constitutional rights when they are infringed by the law or by any act of authority.

Signed Articles

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

FORCES REMOLDING THE LAWYER'S LIFE

Factors Changing the Work and Scope of the Lawyer May Be Divided Into Alterations in His Field of Work, Tendencies in Our Whole Constitution and Organization of Law, and Some General Alterations in Make-up and Ideals of Society — What the Lawyer of the Coming Generation Must Be—Part of Lawyer in Modern Society Rests Essentially with Himself*

By James Grafton Rogers
Assistant Secretary of State; Member of the Colorado Bar

THE American lawyer as America sees him is a somewhat pompous gentleman with a rather kindly eye who talks a jargon of torts, contracts and irrelevant evidence across the desk of a disorderly office or to a somewhat sleepy judge, and charges fees which are either surprisingly large or surprisingly small. He is a rather acceptable member of the community except for his habit of making speeches about the glories of our government. He is inclined to be radical and noisy when young but intensely conservative when older. He is not quite as well educated as the college professor and is looked on as being cultivated like the minister and the physician. He makes an income which is in the upper levels but seldom reaches the scale of the banker, the successful business man or even the wealthy farmer.

The ideal of success which he holds in his mind's eye is to be President, Senator, Governor or a Justice of the Supreme Court. He recognizes that there are business lawyers in the great cities who accumulate fortunes and leave them to colleges, but these do not represent the direct line of his succession. Most of the contacts with the community lawyer are pleasant. He knows and speaks to everybody in the county; takes a rather creditable part in the Community Chest, the Rotary Club and the church organizations. His more fearful aspects are his potentialities for entangling clients in expenses over some apparently trivial matters and for making some innocent witness highly uncomfortable on the stand.

When he dies his widow is likely to find only a small balance in the bank and she may have to be carried as an honorary member of the community's social organizations, but his children have usually gone into the world with more than the average education. On the whole, the world thinks the legal profession is a rather attractive possibility for its sons and we are a little surprised if the brighter lights of the high school do not plan to study law.

If this is a fairly accurate composite picture of what the American people have come to think of the law as a vocation, let us turn for a moment to the details of the picture from inside of the frame. We know on the whole that the typical lawyer has for many generations earned most of his income from the machinery incident to property transfers, the drafting of contracts, the collection of debts, the administration of estates and, in essence, the safeguarding of property and money. His reputation has depended chiefly upon his appearances in court, particularly in trials that had a human and dramatic appeal like criminal cases involving prominent citizens or will contests. These the public attends or reads about and from them comes most of their estimate of the lawyer's capacity. The public still thinks of the distinguished lawyer as a man particularly versed in the Constitution. He is likely to talk about this document in most of his public utterances, but few of us have seen him operating on the Constitution. We know that he spends most of his time drafting mortgages, conducting foreclosures and property sales, writing letters to delinquent creditors and sometimes filing papers in courts as a basis for trials which everybody hopes to avoid. Internally we know that the rewards of his position are not the money which he earns, but are instead the position which his profession gives him in the community, the place he holds as one schooled in the business of government, and as a natural leader in all sorts of community enterprises. The lure to the profession is largely the possibility of dignified and important governmental positions and the capacity to play a solid and respected part in the emergencies of his neighborhood.

Most commentators on the ways and modes of the United States agree that this lawyer whom we have tried to picture has played a larger part in American affairs than has been the fortune of his professional brothers in other nations or at other times. De Tocqueville and Bryce agree on this observation. Two-thirds of the American presidents have been lawyers. The Congress and the state legislatures are full of them. In modern business life they have supplied an important percentage of the executive leaders in finance and industry.

More important than all this, but a little more difficult to measure, is the fact that in the general outlook and attitude of the United States the lawyer's mind has been persistently conspicuous. Next to the banker he has been the chief resister of change and experiment. By and large there have been few innovations in the development of the American institutions and attitudes which most lawyers have not resisted. The bar resisted the Constitution before its adoption but came to make it almost a religion in later years. The lawyer resisted the establishment of Equity, fought the spread of the Field Code of Civil Procedure, con-

*Address delivered at the Annual Meeting of the North Carolina Bar Association, at Chapel Hill, July 23, 1931.

tested the various trends for the political and economic enfranchisement of women, has resisted the introduction of administrative law. It is altogether an impressive record of holding back. Some movements he has defeated. The recall of judges, the recall of judicial decisions, the initiative and referendum all owe him a grudge.

Another phase of the American lawyer, commented upon by many observers, has been his wide divergence from the traditional professional types of the older countries. The American lawyer has been, on the average, much less elaborately educated, much more democratic in origin and outlook, much less concerned with literary or theoretical matters than the lawyers of Great Britain or France. Above all, he has been noticeably more numerous. There has never been anywhere else, on any basis of computation, as many lawyers in proportion to population as there have been in the United States during the whole of the last century.

What has been said so far has been aimed at picturing in bold outline the traditional type of American jurist for the purpose of laying a foundation for some comments on the changes which are now occurring in his life. These changes are so numerous and so overwhelming that I suspect that a picture of the American lawyer painted a century hence will vary widely from that just sketched. The lawyer of the coming century will, I assume, still play his part as a conservative element of his community, but his daily work will consist of a vastly altered routine. The changes going on will to a large extent affect the lives of many of the younger generation now at the bar. What is more important and significant, they will affect very materially the place of the lawyer in American life. If so, they deserve not only our own selfish attention, but the attention of any thoughtful observer of our institutions.

The factors changing the work and scope of the lawyer can be conveniently divided into what I may call:

(1) alterations in his field of work;

(2) tendencies in our whole constitution and organization of law; and

(3) some general alterations in the make-up and ideals of society.

To turn first to the more concrete and internal changes now under way, we can all agree that the lawyer himself is losing jurisdiction over some important fields of activity and upon the other hand, extending his scope into new and unfamiliar areas.

Half a century ago the field of title examination and conveyancing occupied a large sector of the lawyer's time and was the source of an equal part of his income. We have always recognized that the field of real estate was handled in a clumsy and inefficient manner and such abortive movements as the spread of the Torrens Act were aimed at a reformation; but today, two developments of a wholly different sort are gradually removing much of this old business from the lawyer's hands. On the one hand the spread of title insurance is today superseding the old methods and, on the other hand, the ownership of real estate holds a much smaller place in modern wealth and property than many observers recognize. Few of the fortunes of the nineteenth century failed to crystallize around the holding of land. Today few of them move even considerably in that direction.

The invasions in the lawyer's field do not stop here. A substantial part of the bread and butter of the American lawyer as in the past comes from the administration and management of estates. Today the Title and Trust Companies are pressing into this field materially and in my judgment permanently. In a somewhat similar way the inventions of industrial, compensation and liability insurance are invading the margins of his income. There are already indications that the routine of criminal law will be gradually withdrawn as an important field of professional practice. Methods of summary trial, the probation system and the vast power now given to various sorts of penal boards are materially reducing the importance of the jury trial in the enforcement of police regulations. In some instances also new specialized professions have tended to invade fields which seemed for a while to enter the lawyer's province. The income tax, for example, and practice before the Interstate Commerce Commission, which at periods fed and educated many a lawyer's family, have developed special professions which to some extent take over the routine once entrusted to the Bar. All these incursions seem essentially a repetition of the old story that as contacts with government and law become reduced to ministerial acts and formulas, they cease to be a profitable field of the lawyer with his cautious procedure, his elaborate preparation, and his tradition of litigation. Just as the printed deed form replaced the scrivener in earlier days, there is a constant modern tendency of the same type and the natural resistance to it takes the same course.

If the lawyer's field of activity is reduced in some directions, it has been vastly enlarged in others. Half a century ago the field of large business finance with its details of corporate mortgages, municipal bond issues, receiverships, bondholders committees, and more recently the complex preferred stocks and other novel securities, opened a wide doorway for legal activities. The railroad lawyer of the 80's and 90's became the business lawyer of the 1900's, and while this work is still confined to a relatively small proportion of the Bar, it has been one of the largest sources of great legal incomes. Today international law, with its claims commissions, its arbitral tribunals, its World Court, and all the unfamiliar fields of commercial transactions between nationals of different residence, affords an opportunity in which the lawyers of even the smaller towns, in our industrial and fruit growing communities particularly, have found a share. The greatest modern expansion is, however, the development of administrative law as represented by the steady transfer of governmental functions to boards, commissions and bureaus in both the national government and the states. The largest per capita Bar in the United States is located in Washington and the greater part of its activities consists of practice in one form or other before bureaus. The same situation exists in most of the state capitals in a smaller degree. The American lawyer with his common law training has shown a steady resistance to the development of the institutions of this sort which are really borrowed from modern Roman law, and the technique

of their control and supervision by the courts has met with little understanding or sympathy in this country, but any thoughtful observer must recognize that these institutions lie all along the route which modern government is traveling, and while we may deplore, we cannot defeat their development. They have at least opened to the practicing lawyer the largest single new field that modern government affords.

With this brief mention of some of the restrictions and enlargements of the scope of practice in the twentieth century, we can turn to some more general internal tendencies in the character of law itself which affect the lawyer's career. We have today, as in past periods of rapid development, an increase in the quantity of statutory law which has demoralized and in a sense repealed much of the equipment of the common law practitioner. I hazard the guess that two-thirds of the law points studied today by the lawyer involve statutory interpretation or statutory procedure; whereas fifty years ago the lawyer's brief was concerned almost wholly with case precedents. Indeed one of the critical questions of modern legal education is the means of training the law student to meet the statutory material which will occupy his days after graduation. In another direction there is a widening of legal materials, particularly in practice before the federal and major state courts, which puts an altogether new complexion on the content of a legal library and a lawyer's mind. Public utility reports, tax reports, and a dozen other new provisions for legal consultation now fill the lawyer's office and deplete his pocketbook. In many city offices the court reports have been pushed into the back and dusty shelves. In less formal fields, economics, finance, commerce, and to some extent even sociology are daily reading matter of many leaders of the Bar. Where once we spoke of the facts, the law and the constitution as the three divisions of legal Gaul, the modern lawyer tends to find himself in a public library of miscellaneous material. The reason is, of course, partly the dominance of modern business but also in part a deep revision of our conception of the sources and nature of law itself.

The disappearance of the advocate in American legal practice has been often noted. The modern client is impatient of litigation, little concerned with the preservation of any principle or right for its own sake, and rejoices in a lawyer who keeps him out of court as distinguished from one who makes him glorious in court. No doubt as a result of the same cause there has been a tendency on the part of the business lawyer to abandon more and more the old avenues of political and public life. While it is true that the lawyer today is still represented heavily in legislatures, Congress and other governmental posts, it is equally true that a large part of the ablest and most successful element in the Bar have turned their faces deliberately against public life. Two more tendencies in the internal organization of the Bar deserve notice for they will substantially affect our professional lives. One of them is the tendency to institutionalize law. We find not only that the great business organizations now employ salaried lawyers on a large scale, who practically become absorbed in the organism they serve, but there is a noticeable growth of the law office or firm as the foundation of law practice in the cities. There are today in nearly all communities legal partnerships which have long survived their original founders. These have retained much inherited business, have often maintained even the names of departed members, and in nearly every respect have the character today of permanent institutions in and out of which individual lawyers move with little effect on the firm's standing or momentum. In contrast with the traditional British or French practice in which legal partnerships are either rare or positively forbidden, the growth of these quasi corporations is most significant. In another direction also the tendency toward organization is materially influencing the Bar. The Bar Associations, national, state and local, are today assuming an importance and impetus which it is easy to under-estimate and difficult to altogether gauge. As contrasted with the condition preceding the Civil War when the lawyers, except in one or two states and a few of the older eastern cities, had scarcely even the form of organization, we have today active and aggressive societies at every level which are consuming a steadily larger proportion of the lawyer's time, energy and even income. There can be no doubt that the Bar like its sister professions, and in spite of a conservatism which outmatches all of them, is moving steadily towards a guild or class organization which will have a most important influence on our private lives and the public history of this country.

We have skimmed lightly over two sorts of influences which are today molding and modifying the lawyer's life. The first dealt with specific alterations in the lawyer's practice and the subject with which he dealt, the second with vaguer tendencies in the field of professional life. We can turn finally to some movements in society at large which seem certain to carry the lawyer with them and alter his life as they alter the lives of other types of occupation. One of these broad tendencies is the steady rise in the level of education which is certainly one of the major and most important phenomena of the modern world. The lawyer of colonial time owed much of his prestige and influence to the fact that he stood in education measurably above the general level of the community. The minister and here and there a school teacher or son of a wealthy family might have had more formal schooling than the county lawyer, but the mass of the community was made up of farmers, craftsmen and tradesmen to whom the use of books was altogether unfamiliar. Today the years given to schooling of the average lawyer are distinctly fewer than the standards set for hundreds of thousands of men in this country engaged in other occupations. The college professor, the physician, the engineer, sometimes even the modern business executive and banker, represent a level of book training which only a part of the Bar have reached. A few great law schools today require seven years for the completion of a legal education but the great mass of our students are still graduating from schools content with five years at most. The consequences of such common education are most important. The lawyer has been for centuries referred to as "learned counsel" or "my learned

friend" and unless he maintains a higher level of training than other groups in the community, he is certain to suffer in prestige and influence.

A second modern tendency, although largely a governmental and business one, also deserves notice. The centralization of both government and industry brought about as a natural product of easy communications is having influences on the lawyer's life. The county seat lawyer has disappeared in many communities in the United States and the lawyer, like the young man from the farm, has been drawn into the centers of administration and finance in the cities. In England the Bar has been for many years largely concentrated in London because of similar conditions which were there of ancient origin. We must, I think, look forward to a gradual concentration of legal practice in the urban centers of the country. I watch the prospect with no little regret but the facts are evident. Another influence in modern life which impinges upon the lawyer and others is the great acceleration of change. We all agree that more social alterations occur in a single decade of our time than occurred in a whole century of mediaeval Europe or a thousand years at an earlier stage. The modern lawyer, like the modern expert in other fields, must respond to this condition, learn new technique for new methods and institutions, and develop the elasticity which is today expected of the physician and scientist. I have myself relearned my profession at least three times in a little over twenty years of practice and many of you can recall the same experience. Finally among the great tendencies of the day we must recognize a new sort of social outlook which is transforming our conceptions of the relations of human beings, of the functions of government and society, and incidentally of law itself. As a century ago legal philosophy spoke of natural rights and inalienable equalities, all with the concept of political liberty as the main battle field, today we tend more and more to interpret law as a social phenomenon based like other habits and modes of society on the structure of the community. With this change in emphasis, the old legal philosophy with its wide axioms, its ethical and scholastic background is steadily losing conviction. If law is a mere product and mechanism of the society in which it happens to exist, it must be made, interpreted and even approached with a wholly different attitude. It speaks another language.

We have swept with a free hand over a wide field of generalizations and comments. I have no thought that everything said is valid or even that the proper emphasis and completeness has been approached. I realize the danger and insufficiency of generalizations of this type. However great the danger and however insufficient the execution, there seems to me some profit in this sort of effort at a general survey of the lawyer's life. Let me risk one or two generalizations in conclusion. In the first place it is evident that the lawyer of the coming generation must be much more widely and deeply trained and have attained a much wider horizon and a greater elasticity than has ever been demanded of the profession. The provisions for this sort of training are now being made and most of the Bar Associations are committed to steps in the direction of steadily increasing education. In the second place it seems to me that the shifts in the law career not only fall short of threatening the scope, interest and rewards of the lawyer's life but on the other hand vastly increase the attractions. Finally it seems to me that the part the lawyer plays in modern society rests essentially with himself. If he grows with the opportunity, if he steadily expands to meet the responsibilities, he can play as large or a larger part in modern society than he has played in the past. At least one of the problems of our world today, thronged as it is with specialists and students in a thousand narrow channels, is to find somewhere the men of breadth, scope and tolerance who can coordinate the work of technicians, make us the beneficiaries of science and not its victims, employ and direct to the general gain of all men the accumulation of knowledge, skill and property which pile up around us. The modern Bar already shows signs that it can serve this end. With deep learning, the wide sympathy, the habits and analysis and the tolerance of conflicting views which have characterized the best type of the Anglo-American lawyer, I see long hallways and wide doors before the Bar of this country.

Judicial English

"In his recently published work 'Law and Literature and Other Essays' Chief Justice Cardozo of the New York Court of Appeals maintains with force the theory of which his own opinions are an outstanding demonstration that a judicial opinion, properly conceived, is the product of an art, not of a mechanical process. 'A judge with a sense of style,' he says, 'will balk at inaccurate and slipshod thought. Style is thus a form of honor and courage, just as, Santayana tells us, is the pursuit of truth always.' So forcibly is this thesis maintained that one is led to wonder whether the passing of an examination in literary expression of legal thought, conducted by college professors of law and of English, should not be required as a qualification of judgeship. The cultural background which the ability to pass such a test implies would raise greatly the standard of the bench. The judge who has facility and force of style almost invariably is the judge who, like Mr. Justice Holmes, bases his decision on reasoning leading to honest conviction. It is not from such judges that we get opinions of the class described by Judge Cardozo as consisting of a string of quotations followed by a declaration of faith that plaintiff or defendant should prevail. Passing the broad question of style, there are sundry patent errors which every reader of the opinions knows are of frequent occurrence. Taking but one as an illustration, how often one meets the statement that a certain statute is 'not unconstitutional.' As Macaulay was wont to say, the school boy who does not know that a double negative should be avoided deserves a corporal stimulus to his study of rhetoric."—From *Law Notes* (July, 1931).

THE OIL SITUATION AND THE MILITARY

By Hon. Andrew A. Bruce

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AUTOCRATIC power which can be used for commendable purposes can also be used for those which are not commendable. Despotism is a fine thing if only you are always sure of having an honest and a wise despot. A democratic government under the law is by far the most preferable system of social control. At all events it is the safest and most likely to endure. Even beneficent despots sometimes run amuck. Even if the end has come[1] and the proverb that "all is well the ends well" may at the present time be applicable in the oil industry, few will deny that a military force is a dangerous toy to play with in any democracy. The recent military operations in the States of Oklahoma and Texas should at any rate make us realize the danger of an uncontrolled military establishment and they furnish some excuse or reason for the Roman's fear of the Pretorian Guard, the British antagonism to a large standing army, their parliamentary refusal at times to appropriate money for its support, and the provisions in the American Federal Constitution that all revenue bills shall originate in the lower house and that no appropriation for the army shall be for a longer period than two years.

One thing is certain and that is that we cannot allow our executives themselves to make the law and to enforce it by means of their control over the state militias. No matter how good the motives may have been or difficult the situation in the states mentioned, the militia has been called out in order to enforce a gubernatorial fiat and not to enforce any court mandate. The statute, indeed, which it is claimed justified the prorating of the oil production was not in effect and legal operation at the time the troops took the field and even now the agent of the legislature, the Railroad Commission, is attempting to enforce one rule of production while the governor with the aid of the military forces is actually enforcing another.[2]

Of the constitutionality even of the most recent statute which sought to prorate the oil production there is a serious question and in order to sustain it a complete judicial somersault will be necessary. Both the Supreme Court of Texas[3] and the Supreme Court of the United States[4] have insisted on the theory that "oil in place belongs to the owner of the land, and the only right of the state is to prevent its waste or mechanical extraction to the detriment of adjacent owners." Both courts have repudiated the theory that oil bears such an analogy to animals *ferae naturae* that its ownership is in the states themselves and that the right to reduce it to personal possession has to be derived therefrom. When once the right to acquisition and possession is conceded, the right to sell at whatever price one may desire seems necessarily to follow. Even the recent contention of Governor Ross Sterling that "the big oil companies have 325 new oil wells on the sand ready to come in, that these would raise the total production to 450,000 barrels daily, and that 340,000 is far in excess of the amount to avoid wastage and would put the little fellow out of business because he has not the money, like the big operator, to drill more wells,[5] has already been met by the Supreme Court of Texas in the statement that "The right of plaintiffs to an undisturbed flow of oil in its natural course from the main reservoir or source, even though that reservoir or source is not located on their lease, is appurtenant to their title to the lease; but that right is common to the holders of other leases which are supplied with oil from the same common source. All of such lease holders have the right to recover the oil, and the only method so to do is to drill wells and to pump them in the absence of a flow without pumping. Necessarily the first wells drilled draw more from the common supply than others drilled later; and thus there may be an unequal distribution among different leaseholders. But from the very nature of the situation that result is unavoidable, and loss to subsequent drillers occurring in that manner may be designated as damnum absque injuria; the policy of the law being to favor the diligent."[6]

Though in the recent case of Alfred MacMillan et al. v. Railroad Commissioners[7] the United States District court for the Western District of Texas was only called upon to decide, and only directly decided, that no power to enforce a proration had been conferred on the Board of Railroad Commissioners, its dicta certainly pointed to the conclusion that the power of the legislature itself could only be exercised to the extent of preventing physical waste to the detriment of the adjacent land owners and did not embrace "the artificial forcing of prices by governmental action, in cooperation with those in the oil industry interested in raising prices either by stimulating demand or keeping supply in bounds."

This no doubt is the law as now established. If any change is to be made therein it should be made by the courts and not by the use of the military and by gubernatorial fiat. If the statute was valid (and it is to be remembered that the troops were called out and put in control of the oil fields before the statute came into operation), a resort should first have been made to the courts, and the military, if called out at all, called out in order

1. When this article was written there appeared to be a conflict between the governor of Texas and the Railroad Commission as to the method of prorating, the commission having allotted a production of 225 barrels a well and the Governor insisting that the wells should remain closed for a longer period on account of the fact that the big oil producers had drilled more wells than their poorer competitors and even at the rate of 225 barrels would be able to exhaust the common supplies or further glut the market before the less fortunate owners could drill an equal number. The end in fact has not yet come.
2. See Note 1.
3. Peterson v. Grayce Oil Co. (Texas. Jan. 31, 1931) 37 Southwestern Reporter (2nd) 367.
4. Ohio Oil Co. v. Indiana, 177 U. S. 190.
5. See Chicago Tribune of Sept. 2, 1931. See Note 1.
6. Peterson v. Grayce Oil Co. (Texas) 37 Southwestern Reporter (2nd) 367,372.
7. Not yet reported.

to enforce the court's decrees. Perhaps in the past our judges have adopted a wrong theory in regard to our natural resources; perhaps we have carried our theories of private ownership too far and that minerals and oils, like animals *ferae naturae,* should be entirely within state control and their exploitation be the subject of state licenses, but such a change in the established law, if made at all, should be legally and constitutionally effected. America is not yet ready for Oliver Cromwells or for Mussolinis.

We may take it for granted that our state governors may prevent bloodshed and disorder when the local authorities and the local courts are inadequate for the purpose, and may, if necessary, use the military to enforce the law and the mandates of the courts, but there never was yet or will be given to them the power to overrule the decisions of the courts and to make the law themselves.

The danger in the Texas and Oklahoma experiments lies in the fact that they may elsewhere be repeated with disastrous consequences and not only in regard to oil but other personal and property rights. The Southwestern governors, indeed, did not act entirely without precedent and that precedent should make every thoughtful man realize the seriousness of the problem. It was furnished during the ascendancy of the so-called Non-Partisan League which for a number of years, beginning with 1915, controlled the destinies of North Dakota, lacked only 20,000 votes in carrying the State of Minnesota, was so influential and feared in South Dakota that the Republican party surrendered entirely to it and swallowed almost its entire platform, and which gained a strong foothold in a number of other states. This league, though generally thought to have merely involved an agrarian protest, was in fact and in its essence an attempt to bring about a socialistic America. A national party was in contemplation and among the first fifty of the most prominent members of the North Dakota movement is to be found the name of only one who may be termed a "dirt farmer," and nearly all were non-residents. Many of these men at one time belonged to the Socialist party and many of them, such as Charles Edward Russell, the publicist, and David C. Coates, the organizer of the United Workingmen of the World, were of national influence.[8] What they desired was to gain the support of the discontented of all classes. of the discontented farmer in the agricultural states and of the discontented laboring man in the industrial. The opportunity to gain the favor of the coal miners came in North Dakota during the national coal strike and was seized upon by Governor, now United States Senator, Lynn J. Fraser. He was the Governor Sterling of North Dakota. In the lignite coal mines of the State there was absolutely no dissatisfacation and the miners were working under an unexpired war contract and at high wages.

An organizer from the National union however, arrived from Montana and demanded that they organize and insist upon an increase of wages which increase, it is to be noted, was not to be paid to the miners but into the strike fund of the national organization. To this demand the employers refused to agree. The governor ordered them to do so and they again refused. He then called out the militia and ordered them to seize the mines, operate them and distribute the proceeds as he should direct. As in Oklahoma and Texas the militia obeyed. Their's indeed was a difficult situation. The governor was their commander-in-chief. It is the duty of the soldier to do and to die; "Their's not to reason why." So far we have the Texas and Oklahoma situation. But there was another element. The courts were appealed to and State District Judge William L. Nuessle had the courage to issue an injunction and to restrain the interference. He was fully aware of the seriousness of the situation. In his opinion he said:

> "I appreciate that any mandate that this court may issue unless the Governor sees fit to recognize the mandate, cannot be enforced without civil war if the thing is carried to its logical conclusion. I do not want that. I shall make an order requiring that this property be turned back and that further interference be not had by these defendants, such order to be complied with at a future time, far enough in the future so that an appeal can be taken to the Supreme Court, I want this thing settled and every citizen in the state wants it settled. . . . It does not seem to me that the Governor will resist the Supreme Court if the Supreme Court holds as I have in this matter."[9]

Fortunately the matter never came to an issue, as a short time after the handing down of the decision the National Coal Strike was settled and the troops withdrawn. But what would have happened if the strike had continued and the Supreme Court had sustained the District Judge and the Governor had remained obdurate, or, if no appeal had been taken and he had ignored the decision?[10] What would have happened if an appeal had been taken and the District Judge had been overruled? We believe that in either event common sense would have ultimately prevailed and there would neither have been a long continued experiment in confiscation and state socialism or the loss of many lives. But the situation was a serious one. It is always a dangerous thing to play with law and with government. There is such a thing as playing with fire, even in the most foolish of all games—the game of politics. If the oil producers of Oklahoma and of Texas were parties to the present onslaught an orderly government they may yet live to regret the fact.

8. See Bruce, The Non-Partisan League, 60, 88.

9. See Bruce, The Non-Partisan League, 130.

10. And such a refusal of obedience was not entirely improbable. But a short time before, though the Non-Partisans had carried the state as a whole, a hold-over Supreme Court still remained in power. On on occasion when in his capacity of Chief Justice, the writer of this article, asked a prominent political leader for an orderly and peaceable acquiescence in one of its decrees he was met with the curt reply, "Damn you, no. We have carried the state by a large majority." It is only fair however to add that the acquiescence, though delayed, was afterwards forthcoming. See Bruce, The Non-Partisan League, 194-197.

Committees and Committee Work

"It has seemed wise to reduce rather than increase the number of committees. Seven of the standing committees and six of the special committees have been inactive during the past year; most of these have done little or nothing because there was little or nothing for them to do. But the committees cannot be abolished, for at any time questions may arise, as for example, proposal for changes in patent law, which would call for action by the Association. Nothing is more vexing to a busy man than to be called to attend an unnecessary committee meeting where the agenda paper is plainly factitious. On the other hand, it is interesting to observe how readily members respond to a call for a service that is real and needs to be done."—From *Annual Statement of President of Association of the Bar of the City of New York.*

LEGISLATION AND THE EFFECTIVENESS OF LAW

Danger of "Over-Simplification" of Ideas Used in Public Discussion—Need of Re-Examination and Restatement—Consideration of Current Commonplace About "Too Much Legislation"—Another Over-Simplification as to Dominance of Custom—The Actual Legislative Problem—Real Reason for Over-Production of Statutes Is Failureto Delegate More Legislative Functions to Administrative Bodies*

By John Dickinson

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IT is one of the difficulties as it is one of the necessities of all public discussion that it must go on in terms which have been worn smooth and thin in the mill of public opinion. In a great democracy like ours, where public opinion means the opinions of millions of people with different interests and occupations, with different degrees of intelligence and education, there is an inevitable tendency for ideas which are launched into the forum of public debate to become not merely simplified but over-simplified. Over-simplification is the natural consequence of an effort to bring an idea home to an ever-increasing number of minds. It follows that many of the ideas employed as the ground-work of our current thinking about public affairs stand in need of constant examination and re-examination to determine whether or not they have become infected with the fallacy of over-simplification. They may be basically sound; they may express an important fundamental truth; and yet in the process of passing them through the loud-speaker of public opinion they may have lost contact with the limitations and qualifications which are essential to render them safe and accurate instruments of inference or guides of action.

Upon us, as lawyers, rests the primary responsibility in this country of guiding opinion on issues of public policy, and of combating in this field so far as possible the tendency toward over-simplification to which I have referred. The danger is that we ourselves may become victims of the tendency and succumb to the fallacy against which it should be our task to safeguard the less well-informed body of public opinion. We are, after all, part and parcel of the community and subject to the same processes as the rest. Under the stress of our private concerns and our specialized interests and activities we inevitably accept many of the ideas which are in the air about us without subjecting them to independent scrutiny and analysis, and we often find ourselves unconsciously employing as the medium of our own reasoning the common coin of public thought which has been worn thin by the millions of minds through which it has passed before we have occasion to employ it. It is, therefore, desirable that, on occasions like this, when we are for the moment released from purely private concerns, we should examine some of the ideas which we are in the habit of using in making up our minds about public questions, to see how far they stand in need of modification and correction to eliminate the effects of possible over-simplification. I propose to examine from this point of view some of the current commonplaces which we are all of us in the habit of employing on a subject of high importance to lawyers and laymen alike, the subject of legislation.

*Address delivered before the Pennsylvania Bar Association at its 1931 Meeting.

I.

Perhaps the commonest and most universally held idea about this subject is that there is altogether too much legislation in this country; that the quantity of statutory grist turned out by our legislative mills is monstrous in amount and far exceeds the limits of what is necessary or desirable. It is certainly true that the output of our legislative machinery is large; it may be too large. In assuming, however, that it is too large, are we taking into account all the factors which should be considered in reaching a reasoned judgment? Have we properly scrutinized the character and purpose of the legislative output, or are we merely influenced by an initial and uncritical reaction of alarm to the gross number of acts which statisticians tell us are enacted into law? When we learn, for example, that something like 20,000 statutes are passed every two years by the legislatures of our forty-eight states, the initial impression is certainly that so great a number must be uncalled for. If we would avoid the fallacy of over-simplification we must look deeper than the mere number of enactments to the character of what superficially appears to be an excessive output.

It is, first of all, important to note that the 20,000 statutes about which we hear so much are the statutes of forty-eight separate and distinct jurisdictions. No single individual is subject to anything like all of them. In spite of the large amount of commercial activity which goes on across state lines, and which is unquestionably hampered in important respects by the multiplicity of our separate sovereignities, the vast majority of our people are affected at any one time solely by the legislation of a single state. A typical individual, even a typical practitioner of law, has little, if any, concern with the 19,500 statutes which are enacted by the legislatures of the forty-seven states other than his own. In other words, the figure 20,000

does not represent a cumulative burden. If we would estimate the actual meaning and burden of legislation, apart from federal legislation, we must limit ourselves to the legislation of some particular state and ask ourselves whether its legislation is excessive.

Pennsylvania lawyers are in an advantageous position to ask this question because our own state is certainly an offender if quantity and bulk of legislation be regarded as offense. Let us by way of example, take up for somewhat detailed examination the statutory output of the Pennsylvania Legislature of 1929. The statutes passed at that session fill a volume of more than 1,800 pages, exclusive of resolutions, and amount to a total of 601 acts. In this bulky output of a single legislative session, we have an excellent specimen for analysis to determine how far the charge is justified that our legislative bodies are passing too many laws. I have, accordingly, examined these 601 statutes with some care to determine the nature of the subject-matter dealt with, and the extent to which they impose a burden on the individual and introduce uncertainty and confusion for the practicing lawyer.

The first result of the analysis is that of the total of 601 statutes, 362 relate to the conduct and organization of the government of the Commonwealth and its local subdivisions and have practically no bearing on the activities and interests of private individuals. Thus, a very considerable part of the bulk of the statute book is accounted for by the so-called "administrative code" (Laws of 1929—No. 175), which defines the organization of the various administrative branches of the state government, and which runs to a total of 165 pages; by the "fiscal code," which defines the organization and duties of the department of Revenue and other agencies concerned with the collection and disbursement of public moneys (Laws of 1929—No. 176), and by the "general county law" (Laws of 1929—Act. No. 447), which runs to 230 pages. Of course, many of the provisions of the fiscal code are of direct concern to taxpayers but, on the whole, the vastly greater part of all these statutes have a direct bearing and interest only for public officers and employes, and this is still more true of the remaining 359 enactments of this class which the 1929 statute-book contains. Thus, we have an act "for the purchase of digests and law books for the offices of district attorneys of the Commonwealth by the boards of commissioners of counties" (No. 193); an act "requiring county commissioners to provide at the expense of the county telephone, typewriter and stenographic services for the county superintendent of schools" (No. 204); an act "authorizing the register of wills in counties of the fifth class to appoint a solicitor" (No. 206); an act "providing for the purchase by the Commonwealth of a building in the City of Harrisburg for the use of the department of property and supplies" (No. 233); an act "authorizing recorders of deeds in counties of the fourth class to appoint a solicitor" (No. 393); an act "requiring the county commissioners of the respective counties to furnish the county comptroller with an official seal" (No. 437); an act "empowering the salary board of counties of the fourth class to fix the salary of the prison warden" (No. 439); besides numerous acts relating to the conduct and management of schools, the construction and maintenance of highways, the conduct of public penal and charitable institutions, and the like.

In short, the chief bulk of the Pennsylvania legislation of 1929 is accounted for by the character of the state government as a vast operating agency for the management of certain enterprises, like roads, schools, poor relief and the administration of justice, which, in a community of the size of Pennsylvania, call for the organization on a tremendous scale of the agency which is to conduct them. Viewed simply as an operating agency for the performance of these elementary functions of government,—functions which no one would suggest should be taken away from the state,—the government of a state like Pennsylvania necessarily exceeds in size and complexity the largest business corporations which have emerged in even this era of business-giants; and the greatest part of the legislation which the biennial sessions of our legislature add to the statute book are concerned simply with the organization and conduct of the machinery charged with the performance of these tasks and with the provision of funds for their support. Such statutes are of concern to the private individual only in so far as they increase or impede the efficiency of the services which the state performs for the community and which no one today would argue could be satisfactorily performed except by the state. Whether or not the efficient performance of these services calls for the large amount of legislation by the lawmaking body which under our American system of government we are accustomed to devote to it, is, of course, open to question and I shall say something about it at a later point in this paper; but at any rate it is clear that such legislation is not of a character which imposes new restrictions on individual liberties or places burdens, except possibly by way of increased taxes, on the private citizen.

If we deduct from the total output of the legislature of 1929 these 362 acts which are concerned with the organization and operation of governmental agencies, there remain approximately 239 other enactments to be accounted for. Of these, about 30 are tax statutes. The greater number of these apply in each instance to only a simple narrowly defined class of taxpayers, such as banks, insurance companies, public utilities, coal mines, amusement enterprises, dealers and brokers in various types of merchandise, and the like. Perhaps ten statutes, those dealing with the personal property tax, the inheritance tax, tax liens and procedure in tax cases, are of general concern to a large proportion of the tax-paying public. It is open to argument that our tax laws stand seriously in need of simplification and that ten alterations are too many for a single session of the legislature to make without creating confusion and uncertainty. However, when we face this question and realize the importance and great complexity of the question of taxation for a commonwealth of the size and economic diversity of Pennsylvania, it is desirable that we should have an accurate picture of the situation in mind and should understand that the number of legislative changes effected in the year in question was no greater than it really was.

Eliminating tax statutes and statutes dealing with governmental organization, there remain ap-

proximately 200 enactments of the 1929 legislature. These may be grouped into two classes, each including about 100 acts: the class of enactments which may be roughly described as regulatory, and, on the other hand, amendments of the basic corpus of general law.

Of the regulatory statutes, approximately twenty relate to the protection of fish and game, conservation, and to such agricultural matters as the grading of grapes, the certification of seed potatoes and the elimination of forest fire hazards. Two relate to amusements, motion pictures and boxing. Twelve relate to the regulation of traffic, motor, air and water, including the basic "Aeronautics Act" (Act No. 316). Ten are building and zoning statutes and regulations for fire protection, including the municipal building code for cities of the first class, which runs to 120 pages in length (Act No. 413, pages 1063-1182). Fifteen statutes are primarily for the protection of public health, including regulations of milk selling, drugs, medical practice, undertakers, bakers, barber shops, and the practice of optometry and midwifery. There are thirteen statutes dealing with labor relations, four relating to child labor, three to hours of labor and the remainder, for the most part, to the safety of labor in mines. As might be expected, the largest number of the enactments falling in the class of regulatory statutes are regulations of various kinds of businesses. These amount to twenty-six in all. Six relate to insurance, eight to banks and trust companies, three to building and loan associations, three to the sale of corporate securities, and the balance are scattered statutes dealing with real estate brokers, employment agencies, power companies, pipe lines and title insurance companies.

In assessing the burden which this mass of regulatory statutes places on the individual, two facts must be kept in mind. The first is that the vast majority of these statutes are merely amendments and, for the most part, comparatively brief amendments, of existing regulatory legislation. They involve a slight modification of existing requirements rather than an addition of new requirements. It may be said, of course, that even such a mere change of requirements adds to the difficulties of the individual who desires to keep within the law, since it places on him the burden of becoming acquainted with the new enactments and thereby increases uncertainty and inconvenience. In this connection arises the importance of the second fact which it is necessary to take into account, the fact, namely, that any single individual or business concern is subject to only a very inconsiderable portion of the total number of these statutes. Banks have no direct concern with statutes dealing with the safety of mines, the grading of potatoes or the rules of air navigation, laboring men are not required to conform to statutes imposing regulations on insurance companies, optometrists and medical practitioners. In short, the effect of this body of regulatory legislation is not cumulative on the individual citizen, and while a certain burden is doubtless placed on the processes of the community as a whole, it may well be that the beneficial results in the way of added protection to any given individual against the conduct of others, is greater than the additional burden which happens to be placed on him as member of one of the groups subjected to regulation.

When we turn from the class of regulatory statutes to those which are amendments of, or additions to, the corpus of ordinary private law, we find that out of a total of approximately 100 enactments, 83 affect the field of civil and 18 that of criminal law. Of the 83 civil statutes, 31 relate to the law of private corporations, 10 to the law of such corporations in general, and the remainder to the law of special kinds of corporations, insurance corporations, natural gas corporations, agricultural cooperatives and various kinds of non-profit corporations. Six statutes relate to the powers and liabilities of banks. Four are amendments of the Workmen's Compensation Act, two relate to bonds of contractors engaged in public works. Four deal with the subject of eminent domain. Thirteen deal with civil procedure, the process of selecting jurors, fees of witnesses, fees of Justices of the Peace, jury fees in Allegheny County, all of relatively restricted importance. More important are the statutes affecting practice in *assumpsit* and trespass, Orphans' Court practice, practice on appeals and entry and recording of judgments.

The statutes so far considered account for approximately two-thirds of those dealing with the general civil law of the state. The remainder, amounting to twenty-three, deal with guardians and fiduciaries, divorce, adoption of children, bulk-sales, warehouse receipts, checks and notes, mechanics' liens, mortgages, partition, and damages for conversion. Of these subjects the only ones on which more than two statutes were enacted are mortgages and guardians and fiduciaries, each of which was the subject of five enactments.

The scheme of classification resulting in the figures which I have just given is necessarily a rough one. Any classification is bound to be somewhat arbitrary and a different scheme might result in slightly different figures for the various classes of acts. This, however, is of no great significance for our present purposes. The important point is the relative ratio of the different broad categories of legislation. From this standpoint it seems abundantly clear that the corpus of private law as a whole, the corpus of law which governs the great mass of commonplace everyday dealings of the business world, is only slightly affected by the output of even a legislative session so prolific in the total number of its enactments as the Pennsylvania Legislature of 1929. The great body of these enactments relate to more or less specialized departments of activity and, therefore, affect the interests and conduct of only a relatively small portion of the community.

In the light of these facts, the conclusion which I suggest we should draw is a modest one. It is only that we should not take the mere numerical total of statutes annually enacted as a basis for an opinion as to whether we have too much legislation or not. In reaching such an opinion we need to go behind the crude fact of the mere number of statutes and consider other things. We need, for example, to give thought to whether or not some of the things we are attempting to do in the way of regulating special departments of human activity and special fields of conduct by statute can advantageously be done in that way; and we need also

to consider whether or not in regulating the things which can be regulated advantageously, we are preparing our statutes in the most economical manner, or whether, for example, it might be possible by a change in method to get along with fewer statutes even on subjects which can profitably be legislated about. To these questions I propose to devote the remainder of this paper.

II.

First of all, as to whether some of the results that we are today attempting to accomplish by legislative regulation can be accomplished in that way. At this point we run squarely athwart another of those broad crystallizations of public opinion which, like the idea that we have too much legislation, is the common coin of discussion and debate, and forms the more or less unconscious premise of a great many views about legislative matters. I refer to the idea that a great deal of our regulatory legislation is not merely futile but harmful, because, as we say, it is impossible to make men moral or honest or good by governmental *fiat*. Of course it is impossible to do so, but granting this, are we justified in going forward from this premise to the conclusion that all or much of our regulatory legislation attempts to accomplish the impossible? We need rather to ask whether the purpose of regulatory legislation is in fact to make men moral and honest, or whether it may not have other objects which fall more definitely within the range and scope of possible accomplishment.

If we examine the bulk of our regulatory legislation it should be abundantly clear that a great deal of it has no relation whatever to questions of morality or honesty, but is simply designed to insure that particular acts shall be done in a particular way, in one way rather than some other possible way, in order that other persons who are likely to be affected by the acts in question may have a basis for what to expect, may know what to count on, and may thus be enabled to shape their conduct accordingly. This is illustrated, for example, by the vast volume of traffic regulations. No question of morality is involved in whether it is to be lawful for the driver of an automobile to make a left-hand turn at a corner or whether the rear light of a vehicle is to be red or green. The driver is made to do one thing rather than another not because one is morally good and the other morally evil, but in order that other persons may have a reasonable basis for expectation as to which of the two things he will in fact do, and may thus by their own efforts keep out of his way. The same purpose underlies many of the requirements of our corporation laws and laws regulating the marketing of agricultural and manufactured products. Their design is not to make men good, but to supply individuals with a basis of expectation, and therefore with reasonable grounds of action in a world where methods of action change so rapidly that standard types of conduct upon which others can rely have slight chance to grow up and acquire the force of customs.

In a simple society where most men are engaged in the same types of activity, and where these remain stereotyped from generation to generation, standards of conduct can become rooted as customs so that no deliberate and artificial regulations by enacted law are necessary. But in a changing society where individuals are constantly shifting from one narrowly specialized activity to another, and where the methods and technique of any given activity are subject to constant alteration and improvement, customs have small opportunity to become well-established, and individuals are not in a position to have customs ingrained in them by habit. We often hear it said that many matters which we attempt to deal with by law should properly be left to custom. So far as custom can operate, it is certainly a more reliable and effective agency for guiding expectations of conduct than law can ever be, but we do not sufficiently realize that custom is essentially the product of a slow-moving and static society and that its effectiveness is paralyzed when change goes forward at such a rate that customs have no time to form, much less to take root.

So far we have been speaking of legislative regulations which have no direct reference to issues of morality, but much of our regulatory legislation does go further and concerns itself with questions of fair dealing, justice, honesty, carefulness and the like. Admitting that these moral qualities cannot be legislated into human beings by *fiat* of the state, does it necessarily follow that such legislation is futile and meddlesome? In other words, where legislation holds men to certain standards of conduct which have moral implications, must it be said that the purpose of such legislation is to instill into them the moral qualities on which such standards are based, and that since moral qualities cannot be created by law, the legislation is therefore bad? I know of no subject on which there is more widespread confusion than this, or where over-simplification of thought is more in evidence.

Perhaps the most direct way of clarifying the issue is to consider the ordinary common law rules as to fraud and negligence. The conception of fraud certainly carries with it strong moral implications, just as the conception of negligence carries with it an implication of the mental attitude which we describe as carefulness. Is it proper to say that the object of the legal rules which establish liability for fraud and negligence is to instill into individuals the qualities of honesty and carefulness? Even if indirectly and in the long run they may possibly have some tendency to promote that result, it seems clear that their primary object is a different one. Primarily their object is simply to provide that certain types of external conduct shall be followed by certain legal consequences of a deterrent character. They do not aim, in other words, to produce an honest frame of mind on the part of dishonest persons, or a careful frame of mind on the part of careless persons. They merely give notice that if conduct does not measure up to a certain external standard of honesty or carefulness, consequences will ensue of a character probably regarded as undesirable by the person who fails to meet the prescribed standard. In other words, the aim of the law is not to accomplish the hopeless task of altering human character, but merely to insist on conformity of conduct to a standard deemed advisable for the protection of the other individuals who compose the community. If an individual fails or refuses to measure up to that standard, all that the law can do and all that it undertakes to do is to make him pay a penalty in the form of damages or otherwise. There is no

reason to suppose that this last is impossible, or that the resulting protection to the community is rendered nugatory, simply because it happens to be impossible for the law to instill morality into the culprit.

The problem of the legislator is misconceived and the central difficulty of regulatory legislation obscured, by simply saying that law cannot make men honest or moral, and letting the matter go at that. The real difficulty is a different one. It is the difficulty of determining how high a standard of conduct regulatory legislation can reasonably require with any hope of being effective. It is impossible for law to hold men to conformity with a standard so much more strict than that to which they are willing to conform that the difficulties of enforcement will prove insuperable. This is the problem of what may be called the effectiveness of law. Are there any considerations which enable the legislator to determine in advance what standards of conduct can be made effective by governmental action and what standards on the other hand men will refuse to conform to in spite of the threat of penalties?

On this point it is usual to say that no legal standard will or can be effective which is in advance of the general and customary habits and practices of the community,—that law, in other words, cannot be in advance of usage. I suggest that here again we are in the presence of an oversimplification. In a rough way, the view just stated is sound, but only if reduced to the tautology that a law cannot be enforced if it cannot be enforced. Consider the difficulty of determining what we mean when we talk of the existing practice or usage beyond which law cannot advance. In a complex modern society, made up of numerous layers of individuals differing widely in training, intelligence and occupation, there is the widest range of usage on many of the matters with which law has to deal and a wide variety of views and opinions as to what is just and fair and careful in any given set of circumstances. How shall we tell which special brand of usage or opinion out of this variety and diversity is the "normal" one beyond which law may not advance? Shall we try to count noses and allow a temporary majority always to prevail? Is not the usage of an active and aggressive minority often on the way to being imitated and thus becoming the usage of next year's majority? How shall we say that there is a usage at all where the matter in question concerns only a small part of the community and where there are differences of usage within even that restricted group? In short, when we talk of usage we are not dealing with something fixed and stable, but with a fluid, changing, complex phenomenon which alters under our eyes while we are attempting to ascertain it, and this is why we get so little real or substantial aid when we seek the proper standard of the effectiveness of law in a supposed "normal" standard of extra-legal practice.

It is well that this should be so. Where customary practice is so uniform and stable on the part of practically the entire community as to amount to custom in the real and effective sense of the word, then it is true that there is little possibility of improvement or change through the medium of law, or for that matter by any other means. This is why custom-ridden societies always become stagnant and tend, as Walter Bagehot long ago pointed out, to be eliminated in the struggle for survival. If the world they live in alters, the strength of custom keeps them from adapting themselves by law or otherwise to their new environment. By way of illustration we can note the case of British India where this seems to be one of the principal sources of difficulty at the present time. The cake of custom in such instances is encased in so hard a rind that there is no opening for any force making for improvement to insert an effective entering wedge. On the other hand in a society already mobile and diversified, like the industrial nations of western civilization, the varieties and layers of usage existing side by side and competing for adoption create an opening for law to put its force behind one usage rather than another, and thus to enter the field as one of the factors, and a very powerful factor, making for the promotion of certain practices and the abandonment of others. The diversity of existing practices, at the same time that it prevents there being any norm of practice to which law is compelled to conform, makes it possible to employ law as an agency for supporting and extending the practice which ethically or economically seems in advance of the others.

Nor need the practice to which the law lends its aid and which it seeks to enforce necessarily be the practice which at the moment is the practice of the majority. The practice of the numerical majority at any given moment is often hopelessly in the rear of the soundest and best considered practice. If all that law could ever effectively accomplish were to put its force behind the practice of the numerical majority, its influence in perhaps the largest number of instances would be to obstruct rather than promote improvement. Whether or not and how far law can effectively lend its support to enforce standards in advance of the usage of the numerical majority is not a question which can be solved by a formula, but one which depends for its solution on all the circumstances of the particular case. If for one reason or another the practice of the majority is not something seriously insisted on, but rather casual, superficial, and unassociated with positive conviction, law can undertake to insist on a higher standard with excellent prospects of successful enforcement. Again, where there is a determined and powerful minority insisting on the legal enforcement of the new standard, the enforcement can often be made successful even in the face of somewhat determined resistance by the majority. In other words, to put the matter in the form of what looks a truism, but a truism the full meaning of which often fails to be appreciated, the possibility of the successful enforcement of a law depends on the comparative strength of the forces supporting or opposing the particular law at the time. The thing which is so often overlooked is that there are other forces besides the force of mere numbers, for example the force of economic power and social position, and above all the shifting forces of ideas and opinions, which, either accidentally or as a result of manipulation, may convert a majority of resistance today into a majority of acquiescence tomorrow, or vice versa. The influence of these forces frequently makes pos-

sible in the course of time the effective enforcement of a law which was at variance with majority practice when it was adopted; and it is this possibility, and this possibility alone, which enables law to be an instrument of social improvement and progress.

From what I have said it follows that some resistance to law is to be expected as a frequent and natural occurrence. Too often it seems to be assumed as a result of our dislike for some particular statute that if a law arouses resistance it is *ipso facto* a failure and that the measure of non-enforcement resulting from resistance to a law is a conclusive argument that the law has no place on the statute-books. To take such a view is to succumb once more to the fallacy of over-simplification. No law is or can be enforced 100 per cent. If it could be, it would indicate such perfect conformity to the standard prescribed by the law that the law would be entirely superfluous. The enactment of a law prescribing a particular standard indicates that there are individuals whose conduct does not conform to that standard and who can be expected to employ all means in their power to evade conforming to the law. Such efforts are bound in many instances to be successful as long as law has to be administered by fallible human beings. The question of the effectiveness of a law is therefore always one of degree. It depends upon a balance between the skill of the enforcement agency taken together with the social and economic forces supporting the law on the one hand and the strength of the forces opposing the law on the other. Sometimes this balance is so much in favor of the latter forces that there is a comparatively low degree of enforcement. Where this is the case today it is not necessarily true that it will also be the case tomorrow. Propaganda, education, changes in men's interests and methods of acting may lead in time to the fairly complete enforcement of a statute which at the outset met with much successful resistance. Or the same process may work in the opposite direction. Thus Sunday laws which a hundred years ago were enforced with a high degree of effectiveness are enforced much less effectively today.

If we grasp the fact that no law can properly be expected to meet with full and complete enforcement, but that enforcement is always a matter of degree, the whole problem of enforcement is set in a somewhat different light from that in which it is commonly viewed in public discussion. It means in the first place that no law can be expected to accomplish precisely the purpose and results which it was enacted to accomplish. Non-enforcement, to the extent that it is present, operates as a deflecting force producing a result somewhere intermediate between the situation existing prior to the enactment of the law and the result which would be produced by complete enforcement. This intermediate result varies from time to time with the varying degrees of enforcement which follow from shifts in the balance between the forces favoring and the forces opposing the law. No law produces precisely the same results today that it produced yesterday or will produce tomorrow. This means, for one thing, that even a law that is very badly enforced does not leave the situation exactly as it found it. Take for example laws against gambling and vice. No one can doubt that the percentage of enforcement of such laws is comparatively low. On the other hand, no one can doubt that the situation with respect to gambling and vice is different under such laws from what it would be in the absence of the laws. The practices at which the laws are aimed are conducted in a different way and to a different extent because of the laws. This operation of a partially enforced law to deflect a practice into a new form may create a situation which satisfies the dominant forces in the community somewhat better than the situation which would exist in the absence of the law. On the other hand it may bring with it what are regarded as new evils. Whether the good outbalances the evil is always a question which has to be answered for each particular case at a particular time and moment of enforcement and the answer always depends on the nature of the forces which happen at that time to be operating for and against the law in the particular community.

It is sometimes assumed that legislation of certain definite kinds is doomed in advance to meet with so much resistance and to be so difficult of enforcement that it is bound to produce more evil than good. Thus it is no doubt true that legislation which undertakes to regulate practices that can be indulged in by anyone and everyone, like gambling, or spitting on the streets, is more difficult to enforce than legislation affecting the conduct of only a small part of the community like banks and insurance companies. Nevertheless experience indicates that it is too much to assume that the former sort of legislation is always futile. Everything depends on the balance of forces at work within the community for or against the legislation. Thus in Turkey within the last few years legislation has apparently succeeded in effecting a complete revolution in the usages of the people in matters of dress and religion, precisely the kind of matters which it would be most plausible to argue lie completely beyond the sphere of legislation effectiveness. Of course the reason is that this legislation has been supported by vast social changes and by a revolutionary wave of opinion which has undermined and paralyzed the forces of opposition. The same thing was true in France at the time of the French Revolution. On the other hand in India, where such forces have not yet been able to work successfully, it has proved futile or inadvisable to attempt on any considerable scale to eradicate popular customs by law.

If we thus come to the conclusion that in the last analysis the effectiveness of law depends not so much on the nature of the subject-matter dealt with as on the particular forces of support or opposition which from time to time make for or against the enforcement of a particular law, it seems impossible to say that legislation is futile merely for the reason that it deals with this or that subject-matter. One potent argument for the proposition that we have too much legislation thus falls to the ground, because it is no longer possible to say that all legislation dealing with certain classes of subject-matter is *ipso facto* futile. What we need rather to say is that legislation is useless if no honest and sincere attempt is made to enforce it; but when that is the case the blame belongs to the

(*Continued on page* 694)

DEPARTMENT OF CURRENT LEGISLATION

Federal Legislation of 1931

By Middleton Beaman, Charles F. Boots, Henry G. Wood, Alfred K. Cherry, Allan H. Perley, John O'Brien, Eugene J. Ackerson

THE activities of the short session of Congress are not fully indicated by the report on the legislation passed. Those experienced in the ways of the national Capital know full well that a long period of preparation usually precedes the passage of important acts. Consideration in committee, discussion outside of the Capitol, public hearings, and consultation with interested groups and individuals are a necessary preliminary to action on the floor. Of the results of the session, the most discussed act was that securing the payment on adjusted service certificates to veterans, which the Congress put through over the President's veto. Another important statute provided long-time planning by the Government through a newly created Federal Employment Stabilization Board; and still another stiffened the provisions of the District of Columbia law regulating billboards. Most of the other legislation here noted had to do with the details of government service or amendments of existing statutes, embodying the result of experience.

Finance

That Congress can act with expedition in a clear case where the facts are before it and there is no difficulty on principle, appears from Public Resolution 131.

All the Federal estate taxes beginning with the Revenue Act of 1916 have included within the gross estate property of which the decedent has made a transfer "intended to take effect in possession or enjoyment at or after his death." On March 2, 1931, the Supreme Court, in the case of Burnet v. Northern Trust Company, decided that where A has conveyed his property in trust to pay the income to himself for life and on his death to pay the principal to B, the transfer was not covered by the words of the statute. Public Resolution 131 was introduced on the following day and passed both Houses and was signed by the President at 10.30 P. M. on March 3d, expressly including within the gross estate 'a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom."

Congress has not only to adjust its laws to the decisions of the courts, as in Public Resolution 131; it must also be on the watch to preserve its intention by amendment to meet administrative rulings. A ruling of the Commissioner of Internal Revenue issued Nov. 12, 1930, gave rise to the modification, by Public 867, of the Act taxing the manufacture and sale of oleomargarine, in force since 1886. The Act of 1886 provided for a tax of 10 cents a pound in the case of oleomargarine containing "artificial coloration" causing it to look like butter of any shade of yellow, the tax being only one-fourth of a cent a pound in the case of oleomargarine not so colored. By the ruling of the Commissioner, the yellow color given to oleomargarine by the use of unbleached palm oil was held not to result from "artificial coloration," and oleomargarine so colored was thus subject only to the tax of one-fourth of a cent a pound. Before palm oil was used, no commercially satisfactory ingredient had been found to give oleomargarine a yellow color without subjecting the product to the 10 cent tax. This Act changes the basis of taxation so that the 10 cent tax now applies to yellow oleomargarine regardless of the source of its color. A scientific method for determining color is provided for, and it is no longer necessary, as under the old law, to determine whether the color causes the oleomargarine to "look like butter of any shade of yellow." Since the determination of the yellow color will be influenced by the conditions under which the measurements are made, the Commissioner of Internal Revenue is authorized to make rules and regulations governing such conditions.

Aid to the Treasury in refinancing the public debt is afforded by Public 820 which increases the total authorization of Liberty Bonds from $20,000,000,000 to $28,000,000,000. This is in no sense an increase in public indebtedness but is rendered necessary by the fact that of the $20,000,000,000 already authorized over $18,000,000,000 have been issued and in the absence of this Act refinancing of outstanding bonds would have been possible only by means of short term securities.

An important effect on the finances of the Government will be produced by the amendments to the World War Adjusted Compensation Act. One of the chief battlegrounds of the session was the effort to secure for veterans of the World War immediate payment of the face value of their adjusted service certificates, most of which are payable in full in 1945. The agitation resulted in the passage, over the President's veto, of Public 743 which had two chief features—an increase in the loan basis of the certificates and a change in the interest rate. The original Act fixed the loan basis, increasing from year to year, but which in any year should not exceed 90 per centum of the reserve value, which was based on an annual level net premium for twenty years calculated in accordance with the American experience table of mortality and interest at 4 per centum per annum compounded an-

nually. In the case of the great mass of certificates issued in 1925 the loan basis for 1931 was 22½ per centum of the face value. The new Act provides that the loan basis shall in no year be less than 50 per centum of the face value. The basic Act provided, in the case of loans made by the Veterans' Bureau, that interest should be 2 per centum per annum more than the rate for discount of 90-day commercial paper by the Federal Reserve Bank for the district where the loan is made but in no event should the interest exceed 6 per centum per annum. If a loan was made by a bank the interest should not exceed by more than 2 per centum per annum the rate for the discount of 90-day commercial paper by the Federal Reserve Bank for the district in which the bank is located. Public 743 provides that in no event shall interest on loans made after its enactment exceed 4½ per centum per annum compounded annually.

Aliens

Equality between the sexes in the law of citizenship is furthered by Public 829 which amends the Cable Act of 1922. Under the Cable Act if an American woman married an alien ineligible to citizenship she ceased to be a citizen and by an express provision of the Cable Act she could not be naturalized. Furthermore, an American-born woman of a race ineligible to citizenship who had lost her citizenship, either by marriage to an alien himself ineligible or by marriage to any alien prior to the passage of the Cable Act, could not regain her citizenship since persons of her race cannot be naturalized. Public 829 corrects this hard situation and permits an American woman to retain her citizenship, even if she marries an ineligible alien and had she lost it she might regain her nationality in the short way provided by the statute, as could any other American woman. The act also allows women who have lost their American citizenship by residence abroad after marriage to an alien to be naturalized by the short method. In case, however, a woman who has lost her citizenship by residence abroad or marriage to an ineligible alien acquired any other nationality by affirmative action, she cannot benefit by the short naturalization method. Under the Act of 1930 the privilege was limited to women losing their citizenship by marriage to an eligible alien, or by reason of the loss of citizenship by their husbands. A woman who marries an ineligible alien is continued in her citizenship rights by striking out of the Cable Act the express provision to the contrary.

Besides granting these benefits to women the Act also removes discriminations in favor of women by providing that no woman shall be entitled to the short method of naturalization if the citizenship which she has lost originated solely by reason of her marriage to a United States citizen or by reason of the acquisition of United States citizenship by her husband.

Continued agitation for the deportation of alien criminals boiled down in the last session to Public 683 providing that an alien who is convicted and sentenced for a violation of, or conspiracy to violate, any Federal narcotic statute shall be deported. The Act does not apply to addicts who are not dealers in, or peddlers of, narcotic drugs.

Under the Federal parole law the Department of Justice deemed it inconsistent to grant a parole to an alien prisoner if he was immediately to be taken into custody under deportation proceedings. To remedy this, Public 777 provides that if a Federal prisoner is an alien subject to deportation, the Parole Board, after he has become eligible for parole, may release him on condition that he be deported and remain outside the United States.

One of the war Acts provided that an alien who withdrew his declaration of intention in order to avoid military service was forever barred from being naturalized. Public 617 removes this bar in case of an alien who withdrew his declaration of intention in order to secure his discharge from the military service if the withdrawal and discharge took place after the date of the Armistice.

Administration of Justice

The Fifth Amendment to the Constitution provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." Public 548 provides that all offenses the penalty for which does not exceed confinement in a common jail, without hard labor, for a period of six months, or a fine of not more than $500, or both, shall be deemed to be petty offenses and may be prosecuted on information or complaint. It is difficult to see that this statute adds anything to existing law except a declaration of existing practice. Except in the case of a few miscellaneous crimes, there is no express statutory authority for proceeding by information or complaint, but such has been the practice, subject always to the risk of the prosecution being bad if the crime was, as a matter of fact, infamous. This question, of course, is one to be determined by the court and no declaration of Congress can change it. It is believed that the limitations fixed in Public 548 are well within the limits of the Constitution. The declaration in the statute that these offenses shall be "petty offenses" seems to be without effect.

The most important field for the operation of Public 548 is in the field of the prohibition law. The so-called Jones Act, fixing a penalty of a fine of not more than $10,000 or imprisonment for not more than five years, or both, for a number of violations of the Volstead Act, made all such offenses clearly infamous crimes and prosecution had to be by indictment. In order to relieve the Department of Justice, Public 557 enumerates various minor violations the penalty for which is fixed at not more than $500 or confinement in jail, without hard labor, for not more than six months, or both. These cases, therefore, may be prosecuted by information. The offenses enumerated are (1) a sale of not more than one gallon of liquor if the defendant has not been within two years convicted of a violation of the Volstead Act "or" is not an habitual violator, (2) the unlawful making of liquor in an amount not exceeding one gallon if no other person is employed in the production, (3) assisting in unlawfully making or transporting liquor as a casual employee, and (4) the unlawful transportation of not exceeding one gallon of liquor by a person not habitually engaged or employed in violation of the Volstead Act "or" not convicted within two years of a violation of such Act. It is believed that the court will unquestionably construe "or," as above quoted

in two instances, to read "and" as this undoubtedly was the intention of Congress.

Various bills attempting to provide for the trial of petty liquor violations and other petty offenses without jury trial failed of passage.

Section 284 of the Judicial Code [U.S.C., title 28, § 421], amended in 1910 for the purpose of permitting two grand juries to sit concurrently in the populous Southern District of New York (although the amendment is applicable to any district having a city or borough containing at least 300,000 inhabitants), is amended by Public 728 to permit three grand juries to sit concurrently in such district only. As in the case of the provision permitting two grand juries, the judge acts in his discretion upon a written certificate of the district attorney that the exigencies of the public service require the additional grand jury. Numerous and lengthy trust, fraud, prohibition, and narcotic investigations, with delayed prosecutions and consequent miscarriages of justice, were reasons advanced for the later amendment. The Act also authorizes the judge of any district court, upon his own motion, or upon a request by the district attorney or the grand jury, by order to continue the sitting of a grand jury during the term succeeding the term at which such request is made, to enable the jury to finish business begun but not finished at the expiration of a term, subject to the limitation that no grand jury shall sit in all more than three terms. Although such an order of court has been sustained under sections 8 and 284 of the Judicial Code [U.S.C., title 28, §§ 12, 421], (U. S. v. Rockefeller, D.C., S.D., N.Y., 221 Fed. 462; Elwell v. U.S., C.C.A., 7th Cir., 275 Fed. 775, certiorari denied, 257 U.S., 647; Johnson v. U.S., C.C.A., 4th Cir., 5 F. (2d) 471), explicit statutory authority was deemed desirable by the Department of Justice.

Administration

Public 862 provides methods for discharging liens or other encumbrances held by the United States on real or personal property.

In any suit for the foreclosure of a lien or mortgage on real estate brought in any proper Federal or State court, the United States consents to be made a party for the purpose of securing an adjudication with respect to a mortgage or lien which the United States has or claims on the premises and is brought into the case by service of process on the local United States attorney and upon the Attorney General. The United States is given 60 days after service to answer, and the United States may remove such suits from a State court within 30 days after the time required for answer to the federal district court for the district in which the suit is pending. The district court to which any such suit has been removed may remand the case to the State court at any time before judgment "if it shall appear that there is no real dispute respecting the rights of the United States, or all the other parties shall concede of record the claims of the United States." Judicial sale in pursuance of a judgment in such a suit has the effect on the encumbrance of the United States provided by the local law. An exception is made, however, that sales to satisfy liens inferior to that of the United States shall not discharge the encumbrance of the United States unless the United States consents to a sale free of such encumbrance and the proceeds are divided. A further exception provides that after sale to satisfy a lien prior to that of the United States, the United States shall have one year in which to redeem. In foreclosure suits covered by the Act where the debt to the United States secured by the encumbrance is due, the United States may sue for the foreclosure of its own encumbrance. The Act further provides that in any foreclosure suit if the encumbrance of the United States is a first mortgage or lien, the United States may bid in at the sale a sum not exceeding the amount of the claim of the United States plus the expenses of the sale. Provision is made that in all suits under the Act the United States shall not be liable for costs or any money judgment and in the removal proceedings the United States need not file a removal bond.

The holder of a recorded lien against either real or personal property may have a junior lien (except a tax lien) held by the United States discharged by application to the officer of the United States having administration of the law in respect of which the claim secured arises. If such officer finds that the proceeds of a sale would be insufficient to satisfy "in whole or in part" the claim of the United States, or the claim has been discharged, or the statute of limitations has run on the claim, or for any other reason the claim has become unenforceable, he is obliged to report to the Comptroller General who issues a certificate releasing the lien.

Public 862 does not expressly and probably does not impliedly repeal section 1127 of the Revenue Act of 1926 (R.S. 3207, as amended) which section provides a special method of discharging Federal tax liens. The question remains whether the procedure of Public 862 is an alternative for that of the Revenue Act.

Public Works

One of the plans for alleviating unemployment arising from the depression of the business cycle, and for stabilizing business, has a legislative birth in Congress. Public No. 616 creates a Federal Employment Stabilization Board, to be composed of the Secretary of the Treasury, the Secretary of Commerce, the Secretary of Agriculture, and the Secretary of Labor. The board is to advise the President of the trend of employment and business activity and of the existence or approach of periods of business depression and unemployment, and is to cooperate with construction agencies in formulating methods of advance planning. The President is requested, whenever upon recommendation of the board he finds that there exists or is likely to exist a period of business depression and unemployment, to transmit to the Congress supplemental estimates for emergency appropriations, to be expanded upon highways constructed under the Federal Highway Act, rivers and harbors work, flood control projects, public buildings, and other authorized construction projects. The President is further authorized to direct construction agencies to accelerate the prosecution of authorized construction during periods of business depression.

In the Act Congress declares its policy to properly arrange the timing of construction of public works so as to assist in the stabilization of industry and employment. To that end the several

construction agencies are required to prepare a six-year program of advance plans, including the plans for the acquisition of sites, preparation of detailed construction plans, and estimated costs. The six-year program is to be kept up-to-date by an annual revision and by annually extending the plans and estimates for an additional year.

Public No. 736 is a measure designed to expedite the taking of title to and possession of lands authorized to be acquired by the Government for public use outside the District of Columbia, thus expediting the construction of public buildings and works authorized by Congress. It provides for the filing of a declaration of taking signed by the authority empowered by law to acquire the lands described in the condemnation petition, declaring that the lands are thereby taken for the use of the United States. Upon the filing of the declaration of taking and upon deposit in the registry of the court of the amount of the estimated compensation stated in the declaration, title to the lands vests in the United States and they are deemed to be condemned and taken for the use of the United States. Thereupon the right to just compensation vests in the persons entitled thereto, such compensation to be ascertained and awarded in the condemnation proceeding. In the Act of March 1, 1929 (45 Stat. 1415), a similar provision was enacted relating to condemnation proceedings by the United States for sites for public buildings within the District of Columbia.

Federal contracts for the construction, alteration, or repair of public buildings in the States and the District of Columbia are required by Public 798 to contain a provision that the wages paid laborers and mechanics employed by the Government contractor and his subcontractors on the project "shall be not less than the prevailing rate of wages for work of a similar nature in the city, town, village, or other civil division" of the State or the District of Columbia, where the work is done. Such contracts are also required to contain a provision that in case any dispute arises as to what are the prevailing rates, which can not be adjusted by the contracting officer, the matter shall be referred to the Secretary of Labor whose determination shall be conclusive on "all parties to the contract." The law may be suspended by the President in times of national emergency. The effective date of the Act was delayed 30 days, and it does not affect contracts in existence on its effective date, or entered into pursuant to bids invitations for which were outstanding at the time of its passage.

The Act is designed to abolish the practice of contractors importing workmen into a community and cutting wages below the community scale.

It is to be noted that the policy of the statute is effectuated by the force of the contract rather than by the imposition of criminal penalties as in the case of the eight-hour law for Federal works. Several interesting consequences and a number of perplexing problems arise by reason of the use of this method. No express authorization is given the contracting officer to insert special provisions calculated to penalize failures of the contractor to abide by the terms required by the Act to be in the contract. If the contracting officer can not require such provisions, what remedies are available to the United States other than termination of the contract? Another question raised is whether the term "prevailing rate of wages" is so indefinite that contracts with the statutory clause in them would fail. The contention in such cases would be based upon the indefiniteness of the contract rather than upon the statute, and the principle relied on in Connally v. General Construction Co. (1926) 269 U.S. 385, that a statute violates the requirements of due process if it is so indefinite as to fail to inform the person affected by the statute of his liabilities under it, would not be applicable. (A determination of the prevailing wages by the Secretary of Labor, and the fact that the area of inquiry is limited to a city, town, etc., would eliminate any objection based upon indefiniteness in many cases.) That the policy of the statute is accomplished by the use of a contract raises the problem whether such contracts are subject to the ordinary rules of conflict of laws (See, Cooke v. U.S. (1875) 91 U.S. 389 and U.S. v. Dewart Milk Product Co. (1924) 300 Fed. 448) with the possible result that the applicable legal standard for determining prevailing rates of wages or what subcontractors were included, as well as for determining whether such a contract gave a right of action to the laborer on the theory of contracts for the benefit of third parties, could vary from State to State. There is no doubt that if the force of the provision were derived directly from the statute a single Federal rule based on the intention of Congress would apply in the determination of such questions.

Federal Administration

Experience evidences the need for improvement of the machinery of government. Congress gives much time to the task of considering suggestions of the administration for specific changes in organization. The first six sections of Public 715 relate to the appointment and promotion of clerks in the foreign service of the United States and also provide for the classification, salary, and subsistence of such clerks. Section 7 constitutes an amendment to the Foreign Service Act of May 24, 1924, commonly known as the "Rogers Act." The changes made were designed to eliminate defects with respect to appointment, promotion, salary, subsistence, and retirement of foreign service officers which had been discovered during the past six years of practical experience under the Rogers Act. The notable changes relate to compensation and retirement. This Act also abolishes the Office of Solicitor of the State Department and creates in lieu thereof the Office of Legal Advisor who shall be appointed by the President, by and with the consent of the Senate, and receive the same salary as Assistant Secretaries of State.

A new retirement system is provided, by Public 781, for employees of the Panama Canal and of the Panama Railroad Company, on the Isthmus of Panama, who are citizens of the United States. Heretofore the retirement of employees of the Panama Canal has been governed by the Act providing for retirement of civil service employees in the United States, and the retirement of employees of the Panama Railroad Company by a plan formulated by that company, a corporation all the stock of which is owned by the United States. This Act was passed because of special considerations enter-

ing into the problem of retirement of such employees. The report of the House committee reveals that climatic conditions and the presence of various diseases constitute a menace to the health of employees in the Canal Zone, and, furthermore, such employees when separated from their employment are required to leave the Canal Zone, thus being under the necessity of establishing themselves in new surroundings. The Act provides for higher annuities, and for retirement at an earlier age than in the case of such civil service employees in the United States. Special recognition is given to the service of employees who worked in the Canal Zone at the time of the construction of the canal, by the provision for adding to the annuity the amount of $36 a year for each year of service during the construction days, and by allowing such employees to retire at an earlier age than others.

For some years past the President by executive orders has relieved the Government employees in the District of Columbia from work on Saturday afternoons during the summer months. Public 783 provides a Saturday half-holiday throughout the year for all civil employees of the Federal Government and the District of Columbia, exclusive of postal employees, employees of the Panama Canal on the Isthmus, and employees of the Interior Department in the field.

Inspectors and employees of the Immigration Service are by Public 774 granted extra compensation for overtime service to be paid by the steamship or railroad company on whose behalf the overtime is required. Employees of the Customs Service had already been granted this privilege.

By Public 672 postal employees whose duties may make it necesary for them to work during the Saturday half holiday are compensated by an equivalent time off for the Saturday afternoon work on one of the next five working days.

Miscellaneous

Public 786 repeals the provisions of prior law relating to outdoor advertising in the District of Columbia and provides for more extensive regulation of such advertising. The Act authorizes the Commissioners of the District, after public hearings, to make and enforce such regulations as they deem advisable in respect to outdoor signs and other forms of exterior advertising on public ways and public space under their control and on private property within public view within the District, in so far as necessary to promote the public health, morals, safety, and welfare. Persons who wish to engage in any such advertising must first obtain a license from the Superintendent of Licenses in the District and the payment of an annual license fee of $5 is required. The Commissioners are also empowered, for good cause shown, to reject applications for licenses and to revoke licenses issued.

Under the prior law, bill posters and persons engaged in the business of painting or placing signs or advertisements on land, buildings, billboards, fences or other structures in the District visible from a street or other public space were required to pay an annual tax of $20. A written authorization had to be obtained from the Commissioners before an advertisement or poster could be put up and such an authorization could be granted with respect to residential streets only upon application in writing of a majority of the residents on both sides of the block in which the display was to be made. The provisions of the Act did not apply to persons advertising a business, exhibition or entertainment on the premises where it was conducted or to any sign relating to the sale, rent, or lease of lands which was placed on the lands referred to therein.

Various sections of the United States Warehouse Act are amended by Public 772. The important amendments to the Act have the effect of making the federal administration of the Act more independent of State laws and practices. The bond required of licensed warehousemen is no longer required to be security for the performance of obligations under the State law. Section 25 of the Warehouse Act contained a provision that nothing in the Act should conflict with State laws relating to warehouses, warehousemen, and other persons regulated by the Act, and contained a requirement that the Secretary of Agriculture cooperate with State officials enforcing such State laws. The new amendment eliminates the provisions of section 25 relating to avoidance of conflict with State laws, and provides that the authority of the Secretary with respect to persons securing a license under the Act shall be exclusive. The exercise of the Secretary's power to cooperate with State officials in enforcing State laws is made discretionary. The $2 annual fee for warehousemen is repealed, and the Secretary is given power to fix reasonable fees for warehousemen's licenses as well as for licenses for persons classifying, inspecting, grading, sampling, or weighing agricultural products under the Act. The bond required of warehousemen may, in the discretion of the Secretary, contain a provision for insurance against risks in addition to that of fire.

The new law makes changing a receipt issued under the Act a crime and increases the maximum prison term on certain offenses under the Act from one year to ten years. Minor amendments expressly authorize the Secretary to delegate some of his duties under the Warehouse Act to a representative.

Public 787 authorizes an annual appropriation of $100,000 for the Library of Congress to provide books for the use of adult blind residents of the United States. Authority is given the Librarian to arrange with libraries to serve as centers for the circulation of the books, in the lending of which preference is to be given to blind persons honorably discharged from the United States military and naval service.

Public 846 extends the benefits to Porto Rico of (1) the Acts providing for the establishment and maintenance of agricultural experiment stations and (2) the Act providing for cooperative extension work in agriculture carried on in connection with land grant colleges.

This Act is substantially the same as Public 395, 70th Congress, extending provisions of the above Acts to the Territory of Hawaii.

Public 791 provides that Porto Rico shall be entitled to share in the benefits of the Acts relating to vocational education and vocational rehabilitation upon the same terms and conditions as the several States. Appropriations available for such participation commence with the fiscal year beginning July 1, 1931.

COMPETITION AND COOPERATION BETWEEN BAR AND CORPORATE FIDUCIARIES

Reasons for Somewhat Controversial Relations Between the Two During Recent Years—Each Has Proper Sphere of Activity and if Its Bounds Are Observed, No Difficulty Need Arise—Banks and Trust Companies Not Alone to Blame—Clients Entitled to Disinterested Advice—Spirit of Cooperation Shown by Many Institutions*

By John G. Jackson

Chairman of Association's Committee on Unauthorized Practice of the Law

I WOULD like first to express my appreciation of the honor of being invited to address this distinguished Association, and then the hope that I may be able to contribute something toward co-operation between the Bar and corporate fiduciaries. The relations between the two in recent years have been unfortunately somewhat controversial—and from the viewpoint of the Bar justifiably so in certain places. I say it is unfortunate that any serious controversy should exist between the two because I believe each has its proper and legitimate field of activity, and that if each keeps within the bounds of its own proper field of activity, no cause for controversy could arise. In this day and generation no one can reasonably dispute the economic necessity for corporate fiduciaries, for every state in the Union, as well as the Federal Government, has recognized the corporate advantages for fiduciary purposes of continuity of life, supervised financial strength, business experience and contacts beyond those which any one man can ordinarily possess. If the Banks and Trust Companies would continue their advertisements for business to these and like features and their activities, to the carrying out of the business of the estates and trusts committed to their charge, no cause for trouble or conflict would arise. As a matter of fact, the better class Banks and Trust Companies, and the more experienced Trust Officers, do follow precisely that policy. They do this not only because it is the field of activity which is theirs legally and properly, but also because they recognize that an enormous amount of trust business can and does come to them from members of the Bar. It is accordingly a matter of self-interest and good policy for a Bank or Trust Company to secure the good will of the Bar.

The manner in which the troubles and the conflicts have arisen seems to me to be quite clear. While Trust Companies in this and other states have been authorized to act as Executors and Trustees for many years, the real growth of their fiduciary business is of comparatively recent origin. When they came to the realization of the great value of this business as a source of revenue, they set out to secure it. From such efforts have grown the advertisements, the selling tactics and the relationships with lawyers that have caused the complaints that have arisen not only in New York State but throughout the entire country. It is not unnatural that this should have happened. The lay officers of a corporate fiduciary saw open to them a large amount of productive business, and they set out to secure it, uninfluenced and uncontrolled by any established code of ethics regulating their procedure. I do not mean by this that the officials of corporate fiduciaries are not men of character. On the contrary, it is my experience that as a rule they are men of the highest character, and on that account are selected for their positions. What I do mean is that the point of view of these officials, undertaking to secure fiduciary business, was simply that of a business man. He wanted the business for his institution, he proposed to execute it honorably, and he saw no reason why he should not use the most potent selling advertisements and arguments he could think of, and, having secured the business, have the counsel for the fiduciary prepare the will or trust agreement. There was undoubtedly a failure to appreciate the rule that in fiduciary relations there must be no adverse or selfish interest and a prospective testator or trustor is entitled to advice unaffected by any other interest than his own. That failure still exists in places, and it is that which creates the conflict between the Bar and corporate fiduciaries. I am satisfied that the true basis for co-operation between the two lies in the mutual recognition and effective carrying into execution of the policy of disinterested advice to the client.

It is not just to place all the blame on the Banks and Trust Companies alone for the failure to carry out this policy. The Bar is equally to blame, for a Bank or a Trust Company could not properly prepare a will or trust agreement without the advice and services of a lawyer. The adherence therefore by our own profession to this principle will largely remove the possibility of conflict.

The correctness as a matter of ethics of the principle which I have stated is disputed by some members of the Bar. It is said by them that the application of this principle will do more harm than good, that where the client is sent by the prospective fiduciary to its attorneys to have his will drawn, is informed that the lawyer represents the fiduciary and no objection is made to that fact and the will is drawn in accordance with the client's instructions, no basis for criticism exists; that it is the general practice of banks and trust companies to recommend to a prospective testator or trustor that he go to his own lawyer to have his will or trust agreement drawn and that frequently

*Address delivered before the Annual Meeting (1931) of the Federation of Bar Associations of Western New York.

the man either has no lawyer, or, if he has one, doesn't want to go to him for this particular purpose, believing that his lawyer is not experienced in fiduciary law; that accordingly the bank's attorneys are chosen to prepare the document because both the client and the bank have confidence in the ability of the bank's counsel to draw a will or trust agreement that will truly express the wishes of the client and will not give rise to unnecessary difficulties in its execution.

These in substance are the arguments advanced to support the propriety of wills and trust indentures being drawn by counsel for the corporate fiduciary. I do not think they stand up under the light of analysis.

When a client consents to such an arrangement he is consenting to something of which he is totally uninformed for no layman can comprehend the factors entering into the preparation of a will or trust agreement of more than ordinary simplicity. Judge Pound has characterized that as "one of the most difficult tasks that a New York lawyer is called on to perform" (1 N. Y. State Bar Association Bulletins 283), and yet it is apt to be the most far reaching and important legal act of a man's life.

No doubt the attorneys for Banks and Trust Companies are skilled as a rule in preparing wills and trust agreements, but I cannot concede that the Bar generally, composed as it is of men of special training, education and character, does not also possess the knowledge required to draw wills and trust agreements.

To argue that it is desirable for the fiduciary's counsel to draw the instrument because then he will be the one to advise in the administration of the estate or trust, can be characterized as a self-serving plea to control future business, but more than that and assuming, as I do, the good faith of the argument, it totally ignores the basic question of divided allegiance.

The Appellate Division of the First Department in a recent decision in a disciplinary proceeding said:

"We think the high standard set for the members of the legal profession compels disapproval of a relationship which could not but lead to a divided loyalty. (*Matter of Cherry*, 228 App. Div. 458.)

The Committee on Professional Ethics and Grievances of the American Bar Association in its opinion No. 10 expresses the same view, saying, with reference to a salaried lawyer-trust officer:

"As an employee his only duty is to his employer. As a lawyer he owes a duty to the Court and to the public, as well as to his client. Can he consistently act in these dual capacities at one and the same time? Being dependent on his employer's pleasure for his livelihood, can he properly observe that independence of judgment and action that are indispensable to the advocate in court? May there not be a conflict between his duty to his employer as an employee and the professional duty which he may owe to the Court and to the profession. However, it is unnecessary to further pursue this thought, as, in the question presented, the attorney's employer is acting in a fiduciary capacity and the matter, therefore, assumes an entirely different character. In that event the attorney's employer, the trust company, is only the nominal client, the actual interests which the attorney is engaged to protect being those of the trust estate. *Such a separate interest can only be properly represented by an attorney who, in his professional conduct of the case,* is under no obligation to another such as that which must exist between master and servant. He must be free to exercise his independent judgment as an attorney for the benefit of the interests he represents, which he could not be expected to do while under the domination of a third party as its salaried servant."

In the opinion of the Appellate Division 180 App. Div. 494, affirming the conviction of the Peoples Trust Company for a violation of Section 280 of the Penal Law, the Court said:

"The relation between attorney and client is confidential in the extreme. The attorney is under all the obligations attached to a fiduciary relation, and above all things he owes undivided loyalty to his client, unhampered by obligations to any other employer. These duties are enforced by the drastic remedy of disbarment proceeding, a measure outside of and in addition to other legal remedies. An attorney may not divulge confidential communications of his clients or the advice given thereon. It is obvious that the intervention of a corporation, the general employer of an attorney, between him and his client, is destructive of this necessary and important relation. There can be no longer uninfluenced devotion to the client's interests. There exists along with, and necessarily influencing, the devotion to the client, the duty which the attorney owes to his general employers. Divided obligations in trust relations are obnoxious to the law, and in none more so than in that of attorney and client. It was to remedy the growing tendency of corporations to enter the field of practicing law, and perform legal services through lawyers in their general employ, and owing loyalty primarily to them, and not to the client, that this law was enacted."

That this prohibited conflict of interest exists where counsel represent both the corporate fiduciary and the testator or settlor is clear both from the authorities I have quoted and from a consideration of the practical questions upon which the attorney must advise the client.

At the very outset there is the question of whether or not the particular Bank or Trust Company which the lawyer represents should be appointed trustee or executor. Is it the institution best adapted to carry out the client's wishes? Is its solvency and continuity assured? It is interesting to note that in New York City a company has recently been organized which advertises itself as "A New and Different Trust Company." It claims peculiar fitness for appointment as Trustee and Executor for a number of reasons, among which are that it does no commercial or investment banking, that neither the company nor its officers, directors, or its investment counsel, engage in the merchandising of securities, that it makes investment decisions only after considering the judgment of independent investment counsel based upon extensive research, that it has a set-up designed to assure clients of continuity of present independence and policies, and that it specializes in personal trust and investment work, doing no corporate trust work. Another Trust Company, one of the oldest, repeatedly advertises that it has no securities for sale.

If trust companies consider such standards and policies of importance, should not the client receive the advice concerning them of an independent lawyer? What is the position of counsel for a commercial bank, engaging in the underwriting and sale of securities and doing corporate trust work? If he wishes to retain his position, he cannot advise a prospective testator that these activities of his banking client affect its qualifications to act as Executor, yet the refusal to engage in these activities is now advanced by a Trust Company as a peculiar and special qualification for fiduciary service.

Other matters of equal importance upon which the client is entitled to disinterested advice are

whether property should be left outright or in trust, if a trust is to be created, how long should it last, should there be more than one executor or trustee, what shall be the powers of investment, the compensation of the trustee, and the limitations of responsibility. In all of these matters a possible conflict of interests exists between the prospective testator or trustor on the one hand, and the corporate fiduciary on the other hand.

It necessarily follows that a lawyer advising a client on these matters must be in a position to give his complete and full loyalty and allegiance to that client. Whether or not the lawyer is in fact in that position must be decided by the lawyer. The fiduciary cannot decide that question for him, nor can the client. I do not believe that any set of arbitrary rules is as satisfactory a guide as the lawyer's own conscience and the broad principles of ethics I have stated—and if these be disregarded disciplinary proceedings are an efficient corrective. I feel sure, too, that the corporate fiduciaries of the state would be willing to cooperate in maintaining the principle I have stated if we members of the Bar will do our part. We must set our own standards and having done so we can ask the corporate fiduciaries to so conduct their business with lawyers as not to violate our standards. I believe that they will, for the spirit of cooperation has been shown in many ways, by agreements between Bar Associations and Banks and Trust Companies, by reports of Fiduciary Associations, by addresses by trust officers, and by the appointment of Bankers Committees on cooperation with the Bar. For example the Trust Company division of the American Bankers' Association has such a committee the purpose of which is to adjust and reconcile differences between lawyers and Bankers and that committee has undertaken to confer with the Special Committee of the American Bar Association on Unauthorized Practice.

The subject assigned to me presents also the question of competition between the Bar and corporate fiduciaries. It has been said by some that lawyers are not permitted to advertise or solicit business, and therefore banks and trust companies should not be allowed to do so. It seems to me that this argument necessarily assumes either that banks and trust companies in taking on and discharging fiduciary functions engage in the practice of the law, or that admission to the Bar confers some peculiar right on lawyers to be appointed executors and trustees. In no other way that I can see could there be competition between the members of the Bar and corporate fiduciaries. But the practice of law by corporations in New York is prohibited by penal statute, and any individual of good character whether or not admitted to the Bar may be appointed a trustee or executor. It is also of interest to note that recent decisions of the Courts in other states have upheld contempt and quo warranto proceedings against corporations undertaking to practice law. I think, therefore, that there is no basis of competition between the Bar as such and corporate fiduciaries.

In concluding these remarks may I be permitted a few words which apply not only to the practice of law by Trust Companies and Banks but generally to unauthorized practices. The practice of law by unauthorized persons, as I view the situation, is not really a danger to the profession for the reason that unskillful preparation of legal documents and untrained advice on legal questions are more apt than not in the end to create business for the lawyers. Such conduct, does, however, damage the public generally because it affects personal and property rights and the proper administration of justice. If justice could be administered as well and truly by untrained laymen we would not have the insistence that those engaged in the practice of the law be men of special training and character. If the practice of the law is to be commercialized then the standards of the profession will likewise be commercialized and the protection to the client of his personal and confidential relationship with his attorney will become a thing of the past. I believe that the danger of commercialization is real. The replies to the recent questionnaire of the American Bar Association support this statement. The Carnegie Foundation for the Advancement of Teaching in its annual review of legal education states, in discussing unauthorized practices, that the general practitioner is finding himself increasingly exposed to competition at the hands of corporations operating through untrained assistants or through assistants who have received special training in insurance or real estate or banking, and it speaks of this as "at bottom a symptom of the progressive differentiation or breaking up of the legal profession which for many reasons is inevitable and is already clearly under way."

The Harvard Law Review for May contains a note on the practice of law by corporations and apparently considers as quite unobjectionable the practice of certain branches of the law by corporations.

I cannot accept these views for I believe in the necessity for the practice of the law as an independent profession with all the safeguards and standards that now attend it, and that it is the duty of every Bar Association within its own district to protect the public, the administration of justice and the standards of our profession by attacking every lay encroachment, unless it be determined by the public to be in the public interest.

Popularizing Legal News

"The public, the members of the bar and the press all stand to benefit by the scheme announced Thursday night to 'popularize' legal opinions by the organization of a legal news bureau and the establishment of a weekly legal publication. How the idea will work remains to be seen, but few lawyers and few newspaper men of experience will deny that some such plan is needed. Improved handling of legal news and the stimulation of discussion of the legal implications of current news events surely will be welcomed by a large group.

"According to Archibald R. Watson, chairman of the group of lawyers who have been working on the scheme, the publication (probably a revival of the old 'New York Legal Observer') will record the 'constructive achievements' of the judges and lawyers of New York and will 'publish legal discussions and notes sufficiently popular in tone to justify their transmission to the newspapers.'"—From *New York Herald-Tribune*, June 21.

THEORY, EXPERIENCE, EXPERIMENTATION AND THE LOGICAL METHOD

Contribution of the Logical Method in the Operations of the Law—Misconception of Its Proper Place and Function—Conception of a Static Law and Syllogistically Inevitable Conclusions From Antecedent Principles Makes a Master of a Mere Useful Instrumentality—A Forward Looking Logic That Is "Relative to Consequences" and That Uses Principles as Working Hypotheses, etc.*

By Albert J. Harno

Dean of the Law School, University of Illinois

"LAGGING somewhat in the rear came jurisprudence as a science, heavily handicapped by the load of professionalism carried on its back. Like theology, with which it was long associated in Western Europe, civil law, its vigilant guardians averred, was a mysterious substance discovered in the realm of abstract justice by adepts at the business. The mastery of the subject was to be attained mainly by a study of the words of law givers. On such verbal nutriment generations of practicing attorneys were brought to maturity and conviction, and, as long as they were able to keep their domain isolated from the inquiries of the profane, their authority was secure.

"But under the all-penetrating searchlight of modern science it was impossible to maintain this cabalistic spell, especially as law now had to climb down to the market place. The action of legislatures in covering an ever larger area of legal rules with statutory enactments opened whole segments of jurisprudence to examination with reference to the nature and motives of legislative majorities. Contests over the political appointment of judges also made it manifest that there were human factors in judge-made law which could not be hidden from those concerned with the social sciences. Studies in the psychology of prejudice and rationalization shot Damascus blades into the prestige of judicial logic. Battles among judges themselves, eventuating in dissenting opinions, revealed to an observant public the more esoteric magic of judicial determinations.

"To an ever-increasing audience it became apparent that the law was merely a form of social and economic expression, changing with the technology and processes of society and to be understood in connection with the living tissue of which it was a part. In these circumstances, to the consternation of jurists brought up on the common law and 'the eternal principles of justice,' there rose and flourished a new faith covered by the lugubrious phrase 'sociological jurisprudence,' . . . Under this dispensation, it became fitting for students to inquire into the economic and psychological motives of those who made and interpreted the law, into the 'actual social effects of legal institutions and doctrines,' and into the social forces that had produced the existing order and were bearing lawmakers, lawyers, and judges from timeless formalism into an endless development."

These are pointed statements—descriptive, appraising, dismissive. In them jurisprudence, its less elegant relation — the law, the profession, judges, lawyers and legislators pass before the reader in kaleidoscopic review. The quotation is taken from a widely read work of recent publication, *The Rise of American Civilization*,[1] by two penetrating observers of this country's affairs, Charles A. and Mary R. Beard.

Here is an appraisal of the law and of those who toil in its interests. The feeling lingers that the judgment passed is not flattering. "Lagging somewhat in the rear came jurisprudence." Jurisprudence lags while other intellectual pursuits are setting the pace. They have been liberated, but the law is still a "mysterious substance discovered in the realm of abstract justice by adepts at the business." Practicing attorneys are brought to maturity on a "verbal nutriment"—a diet of words. Such improvement as there has been in the law was stimulated, not from within legal circles, but "under the all-penetrating searchlight of modern science," and law has been compelled to "climb down to the market place." "Studies in the psychology of prejudice and rationalization shot Damascus blades into the prestige of judicial logic." The "esoteric magic of judicial determinations" is being revealed to "an observant public." "To an ever-increasing audience" it has become apparent that "law is but a form of social and economic expression," and to the "consternation of jurists brought up on the common law" there are arising inquiries into the "economic and psychological motives of those who make and interpret the law."

This is the judgment. The Law's case in *The Rise of American Civilization* was tried in record time. It would even appear that the analysis was simple and the decision not difficult to make. There is left to the Law that privilege which has given consolation to those "who also ran" ever since the beginning of time—to speculate on what happened and why it happened that way. In doing so, may we, before we explore the foreground, search first the legal hinterland, in an effort to evaluate this

*Address delivered before the Illinois State Bar Association, May 29, 1931.

1. (1930) Vol II, pp. 761-703.

judgment by the Beards, for I take it we cannot dismiss the comments of such discerning critics with shrugs of the shoulder and the lifting of the eyebrows. As I undertake these excursions, I shall discuss the use and limitations of logic in the legal method, and the place and function of experience, theory and experimentation.

In form the growth of the law, according to Mr. Justice Holmes, is logical. "The official theory," he said, "is that each decision follows syllogistically from existing precedents."[2] And this implies, as stated by Dewey:[3]

". . . . that for every possible case which may arise, there is a fixed antecedent rule already at hand; that the case in question is either simple and unambiguous, or is resolvable by direct inspection into a collection of simple and indubitable facts, such as, 'Socrates is a man.' It thus tends, when it is accepted, to produce and confirm what Professor Pound has called mechanical jurisprudence; it flatters that longing for certainty of which Justice Holmes speaks; it reinforces those inert factors in human nature which make men hug as long as possible any idea which has once gained lodgment in the mind."

Since the logical operation in the law is today being attacked with such systematic and deadly barrages that one must be convinced the attackers mean to stop at nothing less than its annihilation, it is well to pause for reflection as to whether any justification in fairness can be found for that method. It is conceivable that the logical process would never have made its appearance in the law if the custom had not been introduced of preserving in writing the reasons for decisions.[4] When thus called upon to explain their decisions judges may well have turned, in order to justify their positions, for support to holdings in similar situations by other judges. Perhaps the method is but the offspring of that "longing for certainty and for repose which is in every human mind" to which Justice Holmes has referred. However that may be, as an alternative to "the law of the Turkish Kadi, where a good man decides under good impulses, and a bad man decides under bad impulses, as the case may be," we must well give our support, and with it a fervent prayer of gratitude, to a system which has made possible a "rational statement which formulates grounds and exposes connecting or logical links."

To the logical operations in the law we are indebted for a measure of assurance "against the troublesome flux of events." The opinions given by judges in connection with decisions in particular cases are made the bases for legal principles. These "norms," as Cohen has called them, "are the historical outcome of social behavior, and in turn they help to determine many customs in a modern community, since men's conduct is governed by their expectations of how the courts will rule."[5] Through them a relative measure of stability is achieved, and stability is an end to be desired in the community. "Men need to know the legal consequences which society through the courts will attach to their specific transactions, the liabilities they are assuming, the fruits they may count upon in entering upon a given course of action."[6]

Stability! The word looms at the very portals of civilization. The method of logic in legal reasoning has made its contribution to stability, and in contributing to stability, it has contributed to the onward movement of civilization. That logic is today discredited in some circles is due not to the method, but to its use. The rapid advancements which have been made in the field of chemistry have brought many blessings to the human race, but chemistry has been used to destroy men, and there are many who fear that some day it may be the means through which the human race itself will be destroyed. The belief that an old form is ever ready at hand from which may be deduced a rule which will cover every on-coming situation is a misconception, and when that belief is carried into action it is worse than that; it is inimical to progress. It illustrates how a useful tool may be misused; how the monkey wrench may be dropped into the machinery.

Logic is a useful instrumentality and nothing more. The facts count and not the form. "Of course," says Cohen, "in practice, judges cannot entirely ignore the factual situation before them. But all too often, alas, has the old rationalistic theory of the law been invoked by courts as an excuse for evading a thorough or scientific analysis of the actual state of affairs."[8] What is material is a weighing of social values. That is paramount; logic is but a tool which may be of assistance in the process. Law must "climb down to the market place." Law moves, and it should move, with the current of the social mores, albeit, it comes "lagging somewhat in the rear." The concept of a changing law is not an innovation of the 1931 vintage. Francis Bacon had the idea in 1600, when he said:[9] "Judges ought above all to remember the conclusion of the Roman Twelve Tables: *salus populi suprema lex* (The Supreme law of all is the weal of the people); and to know that laws, except they be in order to that end, are but things, captious, and oracles not well inspired. . . . And let no man weakly conceive that just laws and true policy have any antipathy; for they are like the spirits and sinews, that one moves with the other." And Dr. Johnson had a clear conception of it when he wrote to Boswell in 1773:[10] "Laws are formed by the manners and exigencies of particular times, and it is but accidental that they last longer than their causes. . . . As manners make laws, manners likewise repeal them."

The throbbing questions of today cannot be solved by formal syllogistic deductions from the wisdom of the past. This does not mean that the law of today must break with the law of the past, but that the present must not be controlled by the past. The common law had it that the legal identity of a wife was lost on her marriage; but social conditions then were much different from now. The wife was an inferior partner, and besides it was profane to introduce her to mundane affairs. Today, alas, alas, all that is changed and the wife sits and smokes as an equal with her husband about the fires of the family council. All is changed, ex-

2. *Common Carriers and the Common Law* (1879) 13 Am. L. Rev. 609, 630.
3. *Logical Method and Law* (1924) 10 Cor. L. Quart. 17, 20.
4. See, Dewey, *ibid.*, 20.
5. Cohen, *Justice Holmes and the Nature of Law* (1931) 31 Colum. L. Rev. 352, 359.
6. Dewey, *Logical Method and Law* (1924) 10 Corn. L. Rev. 17, 24.
8. Cohen, *loc. cit.*, 353.
9. Essays on Councils Civil and Moral, *Of Judicature.*
10. Boswell's *Johnson.*

cept change itself, and the law, though it came lagging, is also changed. Just laws and true policy are "like the spirits and the sinews, that one moves with the other," observed Bacon. "As manners make laws, manners likewise repeal them," said the astute Dr. Johnson. Law is to be "understood in connection with the living tissue of which it is part," echoed the Beards in 1930.

In the immense social fabric which supports a modern civilization complex and baffling elements are involved. Capital and Labor eye one another suspiciously and are often in conflict; heavy migrations to urban centers are creating new and trying problems touching health, sanitation, housing, construction and transportation; business and banking channels need be kept open; products of agriculture must find markets; race hatreds require restraint; the underworld is unruly, and machinery, man-constructed and man-propelled, menaces man's life. In this rushing, hurtling, clashing life, it is the function of the law to promote order, to control and to restrain lest the structure fall. Law is that without which there is naught of civilization. But as civilized life is naught without law, so law also is naught without civilized life. Law has no independent existence. It changes as social conditions change, and so far as social conditions today have changed from the time of Coke, so far should the law have changed.

As judge-made law moves with the social trend so also does legislation. "Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial and political, of the community to be affected thereby. Resort to such facts is necessary, among other things, in order to appreciate the evils sought to be remedied and the possible effects of the remedy proposed. Nearly all legislation involves a weighing of public needs as against private desires, and likewise a weighing of relative social values. Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration, particularly when the public conviction is both deep-seated and wide-spread and has been reached after deliberation".[11] So contracts are made and business intercourse is had in the light of opinions and customs prevailing in the community and not pursuant to formal rules of legal logic. "The subjective sense of justice will, accordingly, find substantial support in the actual rights and interests of the parties, in the habits and opinions of the business world, and the needs of human intercourse. The courts themselves will concede that much greater authority should be attributed to a sense of justice supported by these material factors than they have ventured to (do) in the past. They will feel at liberty to find their proper functions in something else than an anxious search for legal principles supposed to be concealed in the facts of the case".[12]

Stimulated through the writings and addresses of Holmes, Brandeis, Cardozo, Pound, Cook and others in America, and through the contributions of such German and French writers as Ihering, Duguit, Geny and Ehrlich, these realistic views of the law have been gathering momentum. Through discussion, their "solid merits," observes Cohen, "have become more and more obvious." "The danger today," he continues, "is not that they will be ignored, but that their rich content will be impoverished by being harnessed to some *ism* such as functionalism, behaviorism, institutionalism, or the like".[13] Some, in their impetuousness to disclaim connection with logical reasoning and antecedent assurance, appear to deny any usefulness in legal concepts and principles, since these are, it is claimed, but "symbols having no existence save as figments of the mind".[14] In thus parting with concepts or what Cohen calls the "normative point of view in law," these individuals "make law synonymous with what people actually do, i.e., with social behavior".[15]

These persons represent the extreme wing of the realists. They claim for their method that which is followed by the natural scientists. While I believe we stand on the threshold of an era of scientific study and experimentation in the law, these individuals in purporting to state that legal concepts are but symbols having no existence except as figments of the mind, are, I believe, more actualistic than are the physical scientists themselves. "We are told that the reality which science aims at discovering is not the intrinsic nature of things, but only the relations between things—the only reality which modern scientists regards as knowable".[16] Eddington tells us that the external world of physics has become a world of shadows. "Science aims at constructing a world," he states, "which shall be symbolic of the world of commonplace experience. . . . It is all symbolic, and as a symbol the physicist leaves it".[17] To describe legal concepts as symbolic does not therefore "justify banishing them from legal science; they may, in their own way, be as fruitful of results as those of the physical scientist." A description of social behavior and an understanding of the ways of society are necessary for a science of law, "but we must not," Cohen warns us, "let hazy ideas of science make us forget that law is essentially concerned with norms which regulate, rather than with uniformities which describe, human conduct".[18]

Is there then no middle ground? Must we accept either the theory mentioned by the Beards which makes law a "mysterious substance discovered in the realm of abstract justice by adepts at the business," or that which Pound has called "radical neo-realism", which, in his words, denies "there are rules or principles or conceptions or doctrines at all, because all judicial action, or at times much judicial action, cannot be referred to them".[19] Is it true that we must sacrifice either stability and the relative security assured through logical reasoning, or sacrifice that method which takes cognizance of changing social conditions? The answer

11. Mr. Justice Brandeis in dissenting opinion in *Truax* v. *Corrigan* (1921) 257 U. S., 312, 356, 357, 42 Sup. Ct., 124, 138.
12. Gmelin, 9 Legal Philosophy Series (1917) 131.
13. *Loc. cit.*, 356. See also, Cook, *Scientific Method and the Law* (1927) 13 Am. Bar Assoc. J. 303; Frank, *The Law and the Modern Mind* (1930) and Llewellyn, *The Bramble Bush* (1930).
14. Jones (discussing Duguit's views), *Aims and Methods of Legal Science* (1931) 47 Law Quart. Rev. 62, 73.
15. *Loc. cit.*, 357.
16. Jones, *loc. cit.*, 73.
17. *The Nature of the Physical World* (1929) XIII, XIV.
18. *Loc. cit.*, 358.
19. Pound, *The Call for a Realist Jurisprudence* (1931) 44 Harv. L. Rev. 697, 707.

must depend on the view we take of the logical method, and on what sort of a tool we make of logic. If the logical method makes possible only formal deductions from antecedents, then, alas, we have no other choice. But logic is a process of reasoning and not a dogma. It is a tool with which to build and not the structure built. It can be a "logic relative to consequences rather than antecedents, a logic of prediction of probabilities rather than one of deduction of certainties." Logic thus invoked preserves what Cohen calls the "normative point of view," and that which Dewey has characterized "a theory about empirical phenomena, subject to growth and improvement like any other empirical discipline".[20] To continue in the words of Dewey:[21]

"For the purpose of a logic of inquiry into probable consequences, general principles can only be tools justified by the work they do. They are means of intellectual survey, analysis, and insight into the factors of the situation to be dealt with. Like other tools they must be modified when they are applied to new conditions and new results have to be achieved. Here is where the great practical evil of the doctrine of immutable and necessary antecedent rules come in. It sanctifies the old; adherence to it in practice constantly widens the gap between current social conditions and the principles used by the courts. . . . Now it is quite possible that the newer rules may be needed and useful at a certain juncture, and yet that they may also become harmful and socially obstructive if they are hardened into absolute and fixed antecedent premises. But if they are conceived as tools to be adapted to the conditions in which they are employed rather than as absolute and intrinsic 'principles,' attention will go to the facts of social life, and the rules will not be allowed to engross attention and become absolute truths to be maintained intact at all costs."

Logic thus conceived as a tool, becomes a useful device through which the experiences of the past may be arrayed and classified as a background to guide man's actions. So used, it does not bind man to the past as does the formal syllogism of antecedents. It is a forward looking logic. It marshalls the historical outcome of human experience, and helps to determine present action, since such action is, in a measure, governed by the expectations of what the courts will rule. The logical method so employed involves also a different conception of the law. Whereas the concept of law to which the Beards referred as a subject which might be mastered by a study of the words of law givers, involved a stagnated law, enthralled by tradition and precedent, this concept of law does not permit past experience to envelop the present, but rather it constitutes materials for training and equipment with which the lawyer may set out for new adventures. For as the wise explorer, before his expedition, thoroughly familiarizes himself with the experiences of other explorers who before have traveled similar routes, and equips himself against dangers they have encountered, so should we who are engaged on the expedition of the law equip ourselves by mastering so far as we can the materials which record past experiences in the law. The explorer once on his way, no doubt, will meet new and dangerous adventures, but, nevertheless, the hazards of his expedition will be much reduced if at the outset he was prepared well against known dangers. In the words of Judge Cardozo, "history, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future".[22]

Under this forward-looking conception of the law, norms or principles take on a different meaning from that which often has been assigned to them. They no longer are major premises of the past covering minor premises of the present. They are working hypotheses or theories based on what the courts have done which are useful as aids in prophesying what the courts will do. But theories based alone on what the courts have done, have not sufficient breadth of foundation for prophecy as to what the courts will do. The lawyer who advises his clients alone on the basis of what courts have done is not fully alert. Often extrinsic factors quite properly may be considered by the judge to whom the lawyer must present his case. Customs and practices in a community, while not law, may change law. The law as to the fencing of land varies in different parts of the country. Said Dr. Johnson: "As manners make laws, manners likewise repeal them." Changing economic and social conditions are factors to be considered. The law was in Illinois until the decision in *People* v. *Fisher*[23] that a defendant could not waive jury trial in a felony case. The law was until *People* v. *Bruner*[24] that juries in criminal cases were the judges of the law and fact. The strike in a labor dispute was illegal; it no longer is. It is becoming apparent, said the Beards, that law is "merely a form of social and economic expression changing with the technology and processes of society, and to be understood in connection with the living tissue" of which it is a part.

The law is a social instrumentality and it changes as social conditions change. But one of the most difficult questions remains to be answered. How are the changes in the technology and processes of society to be discovered, and when discovered, how are they to be translated into changes in the law? What are the circumstances which should precede a change in the law? What courts *have* decided may be gathered from printed books, but what courts *ought* to decide is a different problem. The technique on what they *have* decided is well developed, but that on what they *ought* to decide is pathetically weak. It is amazing how little progress in all the centuries of legal scholarship has been made in developing this technique. "What have we better than a blind guess," questions Justice Holmes, "to show that the criminal law in its present form does more good than harm? . . . Does punishment deter? Do we deal with criminals on proper principles?"[25] This was said over thirty years ago. We can but echo, today—"What have we?" What methods have we in the law comparable to those of the sciences for the investigation of social data? What methods for the observation of data? What for experimentation? What do we know of the "social effects of legal

20. *Loc. cit.*, 27.
21. *Ibid.*, 26, 27.
22. *The Nature of the Judicial Process* (1921) 53.
23. (1930) 340 Ill., 250.
24. (1931) 348 Ill., 146.
25. (1920) *Col. Legal Papers*, 188, 189.

institutions and doctrines?" There is yet undeveloped among legal scholars that willingness so characteristic among scientific scholars "to follow problems whithersoever they may lead and to submit even the most cherished creeds to trial by experience".[26] "In the complexities of modern life," observes Judge Cardozo, "there is a constantly increasing need for resort by the judges to some fact-finding agency which will substitute exact knowledge of factual conditions for conjecture and impressions".[27] He draws our attention to the opinions of Justice Brandeis. A study of his opinions, Judge Cardozo comments, "will prove an impressive lesson in the capacity of the law to refresh itself from extrinsic sources, and thus vitalize its growth." "His opinions are replete," Judge Cardozo continues, "with references to the 'contemporary conditions, social, industrial, and political of the community affected.' ".[28]

May we draw an illustration from the problems relating to the handling of the convicted criminal? Here is a complex question in which law, criminology, penology and psychiatry overlap. It involves probation, prison sentences, penology and parole. A scientific worker in this field would first acquaint himself with all the theories extant concerning them. Following this he would test them by their results. This would require the careful tabulation of known data concerning each, to be followed by a comparison of the results obtained through each when employed in action. He would thus acquire factual data for further comparisons and conclusions. This, the empirical method, would demand of him that he pursue his investigations into actual life where he would make case studies with living and concrete data. His labors complete, he would be in a position to reveal scientific conclusions and to lead the way with suggestions for improvements. A willingness to follow where search through patient investigation, observation and experimentation leads, is a technique the lawyer must acquire.

But in this search there is one bit of realism that must not be overlooked. The studies made should not end with the factual materials which the law touches and affects in its operations. There also are to be considered the men who administer the law and who are responsible for the processes it employs. What sort of men are they? How are they educated and equipped? What are their ideals, their motives, their purposes, yea, their moral and social outlooks? "What," asks Joseph C. France, "is the complaint of the common sense critic against the lawyer? 'Your profession' this critic would say 'is indifferent to its responsibilities and its vows. The purpose and object of a legal system should be the production of justice. . . . Nevertheless you do not put justice in the first place.' " "Whatever the explanation," Mr. France continues, "the fact remains that our profession has never assumed any responsibility for justice as distinguished from victory".[29]

As one who loves his profession, and who admires to the point of veneration the brilliant and truly great men who by being members of it have given strength and character to it, I yet repeat, here is living factual data which cannot in our journeys into realism be overlooked. For the most important factor of them all is to be found in the kind of men who guide and direct the affairs of the law.

What constitutes a State?
Not high-raised battlement or laboured mound,
Thick wall or moated gate,
Not cities proud with spires and turrets crowned;
Not bays and broad-armed ports,
Where, laughing at the storm, rich navies ride;
Not starred and spangled courts,
Where low-browed baseness wafts perfume to pride.

No:—men, high-minded men,
With powers as far above dull brutes endued
In forest, brake, or den,
As beasts excel cold rocks and brambles rude;
Men, who their duties know,
But know their rights, and knowing, dare maintain,
Prevent the long-aimed blow,
And crush the tyrant while they rend the chain:
These constitute a State.

These words written by Sir William Jones a century and a half ago, ring out with equal clearness today. Men, high-minded men, these constitute a State!

Bumper Crop of Judicial Aspirants

"There exists in Los Angeles county today a very remarkable, in fact, an unparalleled, situation. It is said that the names of 1753 lawyers, approximately one-third of all those registered in the county, have been submitted to Governor Rolph for his consideration in appointing Superior Court or Municipal Court judges to fill the twelve places on the Superior Court bench and the four places on the Municipal Court bench created by the Legislature at its recent session. The burden thrown on the Governor in making the appointments out of that many applicants is overwhelming. He must, of course, seek the advice of judges, laymen and lawyers living in the county, but even they can have no more than a superficial acquaintance with the qualifications of any considerable number of the candidates. Demands are being made upon the Governor to recognize political, racial and religious groups in making the appointments, and representatives of different local centers of population are insisting that their communities be awarded one or more of the places. It seems self-evident that the only factor to be considered in making judicial appointments is the one of the appointee's ability to give the best judicial service to the community, but when we undertake to discover in particular individuals the qualifications necessary to produce satisfactory judicial service we find a most difficult task. Much more than a knowledge of the law is required to make a good judge. Above all, there should be moral and intellectual integrity. Industry, experience and tact are essential qualifications."—From President's Message in California *State Bar Journal* (August, 1931).

26. See discussion, Yntema, *The Purview of Research in the Administration of Justice* (1931) 16 Iowa L. Rev., 337, 343.
27. *The Growth of the Law* (1924) 117.
28. *Ibid.*, 117.
29. Quoted by Sunderland, Handbook of Assoc. of Am. Law Schools (1930).

THE AMERICAN LAW INSTITUTE AND THE YOUNG LAWYER'S OPPORTUNITY

Suggestion That Young Lawyer Take for Special Study the Decisions in His State in One of the Subjects Being Restated by the Institute—Formation of Groups of Such Youthful Practitioners—Plan Would Relate Business Activities to the Intellectual Life and Help in Other Ways*

By John G. Buchanan
Member of the Pittsburgh Bar

DIRECTOR William Draper Lewis has reported on the work of the Institute at each annual meeting of the American Bar Association from 1923 to the present time, and addresses by him and others at meetings of state bar associations and articles in legal periodicals with regard to the work have been of frequent occurrence. In recent years this aspect of the business—shall I call it the marketing of the Institute's product?—has assumed such importance that the office of Adviser on Professional and Public Relations has been established. The Adviser is Herbert F. Goodrich, the able and indefatigable Dean of the University of Pennsylvania Law School. Largely through his efforts, beginning in Michigan and spreading from there to Pennsylvania and New York and ultimately to more than one-half of the States, committees of the state bar associations have been appointed to cooperate with the Institute. They are composed of men of light and leading. In my own State the chairman of the committee is the leader of the bar of the State, former Senator George Wharton Pepper of Philadelphia, and his cooperators are as amply qualified for the work as any lawyers whom I have the pleasure of knowing.

Joint meetings of state cooperating committees with the Reporters have resulted in obtaining the opinions of many able lawyers on questions on which the committees of Advisers or the members of the Council have been divided. The great work, however, of these cooperating committees will be to aid in making the restatement of the law effective in the decisions in their respective jurisdictions. As a means to that end it has been thought desirable to have editions of the restatements, when they are completed, published, if possible, for every State in the Union, with annotations covering exhaustively pertinent decisions of the courts of the State, whether in accord with or in opposition to the text. In New York and Pennsylvania such annotations are already available for the first seven chapters of the Restatement of Contracts. Work on annotations of that subject was in progress in nineteen other States at the time of the last meeting of the Institute. In Michigan and Pennsylvania annotations of a small part of the Restatement of Conflict of Laws had been published and work on such annotations had been done in three other States. In one State work had been done in Agency, in another in Torts.

Now, at length, I have reached the place where the young lawyer comes in. The young lawyer can hardly expect to make such an impression on his colleagues at the bar of the United States that he will not have to wait long for election to membership in the Institute. In most of the States, and particularly in the States where most of you will practice law, the young lawyer can hardly expect that the president of the state bar association will think him qualified to serve on that State's cooperating committee. Not many young lawyers can expect employment by the Institute or by such a committee, even if they desired it. Yet I have this evening a case to submit to the young lawyer. And I am encouraged to think that the case will be accepted just because it is submitted to young lawyers. I can well remember Professor Wambaugh saying in a lecture in this building a score of years ago, "Salmon P. Chase became an advocate of the abolition of slavery because of a professional engagement. In his youth he was an anti-abolitionist, but he was asked to take the case of a man accused of violating the Fugitive Slave Law. He was a young lawyer, and of course he took the case." The remark, appearing to be facetious, was greeted with laughter; but when this had subsided Mr. Wambaugh continued, "Yes, he was a young lawyer and he took the case. It mattered not to him that he lived in a community where the sentiment was strongly pro-slavery. It mattered not to him that taking the case would mean the loss of prospects of professional business. It mattered not to him that taking the case would mean the loss of social standing. It mattered not to him that taking the case would mean ostracism

*This is the concluding part of an address by John G. Buchanan, Esq., of Pittsburgh, delivered to students of the Harvard Law School on February 27, 1931. The suggestion made therein with regard to help which the bar in general, and young lawyers in particular, can give to the American Law Institute should be of interest to our readers. Mr. Buchanan has been, since the inception of the work of the Institute in 1923, a member of the Committee of Advisers on the Conflict of Laws, the subject of which Professor Joseph H. Beale of the Harvard Law School is the Reporter. In the earlier part of his address Mr. Buchanan dealt with the origin and foundation of the Institute and related briefly its history and plans and in more detail the method of discussion and revision of the Restatement in the Committees of Advisers, in the Council and at the annual meetings of the Institute. This part of the address is not published here because of the considerable amount of discussion which such matters have already received in these columns, but those who wish to read it will find that the greater part of it is reproduced in an article entitled "The American Law Institute" in an early number of Case and Comment.—Editor.

in the church of which he was a member. He was a young lawyer, here was a man in need of counsel, and of course he took the case." The case which I have to submit to you gentlemen involves no such burden; and though I have no retainer to offer, it may well be that the successful termination of this case will mean more to you and to your profession than would victory in other cases where fame and profit may seem to be more easily attainable.

When, shortly before my graduation from this school, I sought the advice of Mr. Pound as to my legal reading, he told me to read the reports of my state. It was good advice, but it was a counsel of perfection. There were two hundred and thirty-four volumes of these in the Supreme Court alone, which have now grown to more than three hundred, to say nothing of some scores of volumes antedating the middle of the last century, when the series of the State Reports began, and a score or more of volumes of cases unofficially reported; and the volumes of the Superior Court Reports and what, in Pennsylvania, are not inappropriately termed the "side reports" would run to some hundreds more. So it was that when I had devoured the current reports for ten or twelve years I had left so little time that only a single volume of the two hundred and thirty-four that preceded my coming to the bar was read from cover to cover.

It would not, however, by any means be an impossible task, even in a state with such a long judicial history as Pennsylvania, to become master of all the local decisions on one of the great branches of the law. And why should not each of you, as soon as he has settled down, I hope after a long vacation, to the grind of that profession of which Lord Eldon observed, not altogether wrongly, that a lawyer must live like a hermit and work like a horse—why should not each of you take for his special study the decisions in the State where he practices in one of the subjects of which the Law Institute is making a restatement? As I have said, there are seven of these restatements now under way. Could not each of you, in the community where he practices, if he takes one of these restatements as the basis of his study, find six other men to take the other six and form with them a club for the study of all the restatements? As further restatements are added, members of the club could be added, or, when a restatement is completed and the research in the local decisions pertaining thereto is also completed, the student of that restatement might turn his energies to another. Copies of the latest drafts of completed parts of the restatements may be obtained at nominal expense by writing to the office of the Institute, 3400 Chestnut Street, Philadelphia, and have been furnished gratis to every lawyer who is a member of the Institute. If the club should meet once a week, and the annotations of a chapter of a restatement should be discussed by the annotator with his clubmates and the differences between the local decisions and the statements of the Institute should be the subject of special consideration, the activity of the club would approach more nearly to that of the Reporters' committees of Advisers than does any other professional enterprise of which I have knowledge.

What advantage has this plan over the "hermitage" plan of Lord Eldon? Much every way.

In the first place, the burden of study will be lightened when it is thus shared with others.

In the second place, the systematic carrying out of this plan will relate your business activities to the intellectual life. It may be difficult here and now for you to appreciate just how much that means. You spend your days in the grove of Academe. At the first and most distinguished of American universities, in the finest law school buildings in the world, with the largest reading room in the world, with the largest and best-equipped law library in the world, at the feet of a faculty whose pre-eminence is unchallenged, coming as you do, a chosen generation, from every State in the country and from the uttermost parts of the earth, like the Queen of Sheba to hear the wisdom of Solomon, you have been made to think of the life of the law as a life that not only stimulates your reasoning power, but broadens your interests by bringing all human conduct within the scope of your studies. And when you bring to bear in practice the learning which you have accumulated and the skill in legal reasoning which you have developed here, you will find that the actual consequences to the interests of your client will give an added zest to all your labors. There will be for you something new under the sun. But in this there will be a danger. Some of you men will be confronted by that danger at the very beginning of your life work. If your bent is toward the practice of the metropolis and your scholastic standing and general promise result in your employment by one of the leading firms of the country, you may find yourselves catalogued with fifty or seventy-five or near a hundred lawyers as belonging to the corporation department (doubtless much the largest), the litigation department (probably rather small), the estate department or the tax department of the office or, it may be, dismissed to the Paris branch or the Washington office or to South America for a particular kind of activity, which, far from possessing the infinite variety of the common law, will have a span no greater than that of the business of the engineer or the accountant or the salesman. And even if you are more fortunate in the diversity of the things which you shall have to do at the beginning of your practice, ultimately proficiency in a certain line may cause you to be sought for one kind of thing so often that your nature will be subdued to what it works in, like the dyer's hand. Against such an unfortunate consummation of all your studies here, the club for the thorough discussion and annotation of the restatements will afford no slight guaranty. Belong to such a club and do your duty by it, and you will practice not in a groove or even in a maze, not in the dark but in the gladsome light of jurisprudence.

In the third place, the work of such a club will help you in your business activities. It has been the practice, for ten or fifteen years, of the office of which I am a member, to hold meetings, late every Friday afternoon, of its entire staff of lawyers, or of all but those unavoidably prevented from being present. At these meetings each man in turn, beginning with the senior partner and ending with the youngest associate, or else proceeding in the reverse order, is given an opportunity to speak of the business engaging his attention, and specially of legal questions on which he needs help or on

(*Continued on page* 696)

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JOSEPH R. TAYLOR,
MANAGING EDITOR

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IN TIME OF STRESS

We presume it is safe to take judicial notice of the fact that there is a certain amount of business depression prevailing in the country and that every part of the population is anxious to know what service it can render in the existing situation. It is perhaps easy to make suggestions as to how the bankers and manufacturers and merchants and the public generally can help; at any rate there have been a multitude of such suggestions, a great many of them from leaders in the fields referred to. But no one has as yet suggested how the lawyers as a body can help during this trying period, and there is perhaps a general impression that their contribution must be more or less of a passive character.

But when we consider the repercussions in public sentiment, in the halls of legislation, in executive and administrative circles, which a period of stress and struggle always has had, we are not so sure that the lawyer may not make one of the most valuable of all contributions to the public weal in times like these. Each in his own community, and to the best of his ability, may do something to keep public sentiment and feeling on an even keel—may help to lend a certain stern reasonableness to the consideration of the various plans for restoring "normalcy" which have already been made, and may be made within the next few months with increasing frequency. His opportunity and his privilege in this direction become all the more evident when we reflect that in times of difficulty there is always a tendency to try a lot of experimental tinkering with Constitution and laws; also that a goodly number of proposed panaceas are quite likely to collide with well established constitutional principles, to say nothing of that large body of ideas which the course of our history has marked with the authentic title of "American." As a lawyer, he is naturally the champion and defender of the Constitution, and as a member of a profession which has always played a patriotic part in public affairs, he will hardly be insensible to rash experiments with American ideals.

While we sincerely trust, as we have so often been told, that prosperity is just around the corner and that the corner behind which it coyly lurks is within easy hailing distance, there is always the possibility of a slight delay in its arrival. Under the influence of the difficulties attending such a situation, it is perhaps natural to expect in many quarters demands for, and tolerance of, high-handed executive and legislative action, accompanied by a restiveness at possible restraints from courts or any other institution. In brief, even the most useful and approved constitutional barriers are quite likely to be in bad odor with a lot of people and to be regarded as standing obstinately in the way of plans sure to lead to a successful restoration of normal conditions. Here is where the lawyer can render a real service by reasserting at proper times and on fitting occasions the validity of constitutional principles and sound political ideas generally, in times of difficulty as well as in times of prosperity—by pointing out that the problems to be solved are economic and not legal in the main, and that to deal with them by fretting against barriers wisely erected in the past is simply to waste valuable time on the wrong track.

The article by Judge Andrew A. Bruce on "The Oil Situation and the Military" in this issue suggested the above inquiry as to what the lawyer, as a lawyer, could best do to help the country in times like these. It also, in a general way, seems to suggest the answer. As a citizen and member of the community, with business relations and social interests like those of his neighbors, the lawyer of course can, and will, find many extra-professional ways of doing his part—such as, for instance, helping out on programs for relief of various kinds in his community. But from the professional standpoint, probably nothing he could do would

be one-half so valuable as standing simply and purely for the adequacy of our institutions and the sufficiency of the orderly processes of our laws.

PRINCIPLES AND CONFLICTS

Developments of the past few years in the field of the administration of Justice have brought into sharp relief the conflict of antagonist principles. Above the concrete cases which give rise to the discussions and struggles of the Bar one can almost see these principles contending for the mastery, like the shadowy figures of the Gods above the field of Troy. It is this conflict of principles that gives interest and significance to the legal scene today and makes the lawyer who is taking an active part in the general movements in the legal field realize that he is engaged in no unworthy cause—that he is relating his efforts to something larger than the instant case.

What are these contesting principles as thus revealed? Well, there is the principle of the preservation of the entire judicial power, as the most tried and approved and effective means of securing the administration of justice, as opposed to the principle that would weaken it in essential respects. The struggle between these antagonist ideas is not new. There was the effort to establish the recall of judicial decisions, happily defeated. There have been efforts to strip the equity courts of essential instrumentalities, till now fortunately rejected by the good sense of our national legislators. There have been attempts, taking several forms, to make Congress the final judge of constitutional questions. These have happily proved abortive.

Another and most important concrete form which this irrepressible conflict takes at present concerns admission to the Bar. Shall the Supreme Court control the selection of its ministers, as a necessity for the proper discharge of its functions, or shall they be thrust upon it at the will of doubtless well-intentioned, but politically-minded, legislators? This question has been settled in some states. In others the conflict goes on. The Cannon case in Wisconsin illustrates what vitality there may be in an obvious historical and constitutional fallacy, buttressed by the self-importance of a coordinate branch of the state government. The doctrine of separation of power in such cases receives a bizarre interpretation as meaning that one division of the government may separate some of the most essential powers from another and coequal branch.

The principle that the law is, and should continue to be, a profession, with a special code and a higher responsibility than obtains in the ordinary contractual relations of commercial life, is always at grips with the opposing idea that it is more or less of a business and that ordinary business principles suffice for its proper conduct. When due allowance is made for simple professional self-interest in the concrete form which this conflict may take—as in the protest against the invasion of the field of legal practice by lay agencies—the fact remains that it is this principle which furnishes the main motive and all the moral strength for the struggle. Just how real this struggle is, no lawyer needs to be told at length. Few Bar Associations meet and adjourn these days without having in some way registered their sense of its importance. There have recently been a number of articles in the Journal expressive of the general viewpoint of the profession on the subject.

A learned profession as against a mere collection of rule-of-thumb technicians, or at the worst, a group of half-educated and ill-prepared pretenders—here are two more antagonist ideas whose conflict is not fully ended. In earlier days the capacity and right of almost anyone to practice law was boldly asserted, if not very plausibly maintained. This extreme form of opposition to an educated and efficient Bar has long since ceased to have any real support. But in a more attenuated shape it still survives and calls forth the best efforts of the Bar to prevent it from gaining an occasional victory. All the opposition to raising standards of legal education or to making bar examinations more effective is a lineal descendant of the primitive idea. One of the most interesting and successful struggles of the profession during the past fifteen years has been in support of the principle that the law is and should be kept a learned profession. The march of victory has been steady and there is now every reason to feel that the trumpet has been sounded that "shall never call retreat."

REVIEW OF RECENT SUPREME COURT DECISIONS

When State Court Has Jurisdiction to Enforce Lien on Bankrupt's Estate—Bankrupt's Obligation as Endorser of Promissory Note Not Due When Petition Was Filed, and Where Liability on Endorsement Was Contingent, Is Provable Claim—Unjust Discrimination by Carriers in Allowances to Warehousemen—Liability of Carrier for Defective Switch at Connection Made by Another Company with Its Main Line—Allowance for Attorney's Fees Out of Property Alloted to Indians—Injunction to Prevent Pollution of Water and Beach by Municipality in Another State, etc.

By Edgar Bronson Tolman*

Bankruptcy—Jurisdiction of State Court to Enforce Lien on Bankrupt's Real Estate

A state court may exercise its jurisdiction to enforce a lien against and to decree the sale of a bankrupt's real estate, where the lien attached and suit to enforce the same was instituted more than four months prior to the filing of the petition in bankruptcy, when the state court proceeding is merely to enforce the lien, and is not in fact a proceeding for the settlement of an insolvent's estate.

Straton, et. al. v. New, Jr., et. al., Adv. Op. 617; Sup. Ct. Rep., Vol. 51 p. 465; 17 Am. B. R. (N. S.) 630.

This case came before the Court on a certificate from a circuit court of appeals. The opinion disposing of the question certified was delivered by Mr. Justice Roberts.

It appeared that on April 11, 1927, one Alley obtained a judgment in a state court against the Fall Branch Coal Company, which subsequently became a bankrupt. The judgment became a lien on the real estate of the company when it was docketed on May 5, 1927. On February 20, 1928, Alley filed suit in the same court to enforce his lien.

Subsequently, on August 4, 1928, the coal company filed a voluntary petition in bankruptcy. Meanwhile, the suit in the state court had progressed to the point where commissioners had been appointed to sell the property in satisfaction of the lien. The petitioners, being the trustee in bankruptcy and two mortgagees of the property, who had been made defendants in the proceedings in the state court, brought suit in the federal court in October, 1928, to enjoin the sale. They alleged that it was more advantageous to sell the land in West Virginia along with lands lying in Kentucky, and took the position that the bankruptcy court had exclusive jurisdiction to decree the sale.

The district court entered a decree enjoining the sale, and on appeal the circuit court certified the following question to the Supreme Court:

> "Where creditors have obtained and docketed judgments constituting liens on the real estate of defendant, and have instituted a creditors' suit in a state court to marshal and enforce the liens and sell the real estate subject thereto, does the bankruptcy of defendant occurring more than four months after the institution of the creditors' suit oust the state court of jurisdiction, or vest in the court of bankruptcy power to enjoin further proceedings in the state court?"

In answering the question in the negative Mr. Justice Roberts first summarized the purpose of the act and discussed the exclusive jurisdiction of the bankruptcy court as against proceedings in the state courts after the filing of the petition.

> The purpose of the Bankruptcy Law, passed pursuant to the power of Congress to establish a uniform system of bankruptcy throughout the United States, is to place the property of the bankrupt, wherever found, under the control of the court, for equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. This jurisdiction is exclusive within the field defined by the law, and is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition. . . . It follows that liens cannot thereafter be obtained nor proceedings be had in other courts to reach the property, the district court having acquired the exclusive right to administer all property in the bankrupt's possession. . . . It may inquire into the validity of liens, marshal them, and control their enforcement and liquidation.
>
> The bankruptcy law contains no express provision preserving liens acquired by legal proceedings more than four months before the petition is filed. But it is clearly implied that they shall be saved from the operation of the law, for §67 (f) voids only liens obtained by legal proceedings within that period. It has consequently been held that those acquired earlier, if valid under state law, are preserved, and will be accorded priority by the bankruptcy court in distribution of the estate, in accordance with applicable local law.

With these general propositions as a point of departure the Court approached the appellants' contention that the jurisdiction of the bankruptcy court to enforce liens is not exclusive, but concurrent with that of other appropriate courts, and that the rule of comity is applicable, that the court first lawfully taking jurisdiction shall retain it. Disposition of this contention required an examination into the nature of the proceeding in the state court to determine whether it was in reality an insolvency proceeding or merely a proceeding for the proper enforcement of a lien. A review of a number of earlier cases emphasized the importance of determining this.

> Following these cases the federal courts have with practical unanimity held that where a judgment which constitutes a lien on the debtor's real estate is recovered more than four months prior to the filing of the petition, the bankruptcy court is without jurisdiction to enjoin the prosecution of the creditor's action, instituted prior to the filing of a petition in bankruptcy, to bring about a judicial sale of the real estate.
>
> The trustee in bankruptcy may intervene in such suits to protect the interests of the estate.
>
> It is clear that if the action in the state court was merely in the nature of an execution or proceeding to

*Assisted by James L. Homire.

obtain the avails of the judgment lien it should not have been enjoined by the district court.

A scrutiny of the state statute resulted in the conclusion that the suit in the state court was not an insolvency proceeding, but a proceeding to enforce a valid lien on real estate.

> This statute says nothing about a distribution of assets amongst general creditors. It contains no provision that lien claims presented which cannot be paid because the proceeds of the sale are insufficient shall be wiped out as debts of the defendant. It does not purport to discharge the debtor from his indebtedness generally. It is merely a proceeding in equity to do what would be done by a sheriff or marshal under an appropriate writ for the sale of real estate in execution at law. Such officer upon receiving the proceeds of a judicial sale would under the supervision of the court pay them to those whose liens were discharged by the sale. He would marshal the liens against the proceeds precisely as this statute directs the chancellor to do. The act is in no sense an insolvency statute, and a proceeding thereunder is not therefore avoided by the adjudication of the debtor as a bankrupt. On the contrary, it is mere proceeding to enforce a valid lien or liens against the real estate bound thereby, and falls within the rule announced in *Metcalf* v. *Barker*, [187 U. S. 165].
>
> . . . Most of the cases cited by the appellees to the effect that the initiation of bankruptcy proceedings confers on the district court jurisdiction to enjoin pending suits in state courts deal with the situation where a lien was acquired within four months of the filing of the petition, or where, after the filing of the petition an action was begun to enforce a lien valid in bankruptcy. As heretofore noted, there are a few cases which have held that the bankruptcy court may enjoin proceedings, brought prior to the filing of the petition, to enforce valid liens which are more than four months old at the date of bankruptcy; but these cases are contrary to the decisions of this Court and to the great weight of federal authority.

The case was argued by Mr. Randolph Bias for the appellants and by Mr. Arthur F. Kingdon for the appellees.

Bankruptcy—Proof of Contingent Claims

The obligation of a bankrupt as an endorser of a promissory note is a provable claim under Section 63 (a) (4) of the Bankruptcy Act, although the note had not become due when the petition in bankruptcy was filed, and liability on the endorsement was contingent.

Maynard v. Elliott, Adv. Op. 518; Sup. Ct. Rep., Vol. 51, p. 390; 17 Am. B. R. (N. S.) 501.

This opinion dealt with the propriety of allowing proof of claims upon endorsements against bankrupts' estates. The bankrupts had endorsed promissory notes. Some of the notes were payable to the petitioners within the year after adjudication, and others were payable later. Proof of the claims was allowed, and proceedings were brought by the trustee to expunge the claims as not provable. The Circuit Court of Appeals held the notes not provable, because contingent, since none were due at the time of the petition, and neither presentment nor notice of dishonor had been waived. On certiorari the Supreme Court reversed the judgment in an opinion by MR. JUSTICE STONE.

The Bankruptcy Act, Section 63, provides:

> "(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; . . . (4) founded upon an open account, or upon a contract express or implied: . . .
>
> "(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Section 17 of the Act provides that "A discharge in bankruptcy shall release a bankrupt from all of his provable debts" with certain exceptions. In Section 1 (11) it is provided that "'debt' shall include any debt, demand, or claim provable in bankruptcy."

After pointing out that earlier acts had specifically provided for proof of various classes of contingent liabilities MR. JUSTICE STONE said:

> Although the omission of any reference to contingent claims in §63 of the present Act has led to some confusion and uncertainty in the decisions, it is now settled that claims founded upon contract, which at the time of the bankruptcy are fixed in amount or susceptible of liquidation, may be proved under subdivision (a) (4) of that section, although not absolutely owing when the petition is filed. . . . The sole question now presented is whether the liability of an endorser is of that class.
>
> The obligation of an endorser is at least a "claim," and hence a debt so far as defined by § 1 (11); and the language of §63, which permits proof of a claim "founded . . . upon a contract, express or implied," is broad enough to embrace the liability of an endorser upon negotiable paper which has not matured at the time of the adjudication.

Reference was then made to conflicting decisions on the question whether the obligation of an endorser is within the category of claims not absolutely owing when the petition is filed. Emphasis was given to the fact that the most of the decisions and leading text writers have adhered to the view that such an obligation is within the class of provable claims.

> Only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted, especially where overturning the established practice would have such far-reaching consequences as in the present instance. But such language is wanting in §63. That section purports to be an enumeration of classes of provable claims—not an enumeration of characteristics which must inhere in every claim proved. Only by reading into subdivisions (a) (4) the limitation of subdivision (a) (1) that the claim must be absolutely owing, would there be ground for rejecting a claim against a bankrupt endorser as not complying with the former.

In conclusion, the purpose of the Act was referred to as an aid in reaching its proper construction, and the reasons stated for placing the endorser's liability on the same footing with contingent liability under suretyship contracts, which have been held provable.

> Possible doubts as to the meaning of the section should be resolved in the light of the purpose of the Act "to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." . . . If this purpose be given its appropriate weight, a meaning cannot be attributed to the plain words of subdivision (a) (4), which would so restrict them as to preclude proof of claim upon the liability of an endorser of commercial paper, and result in its survival of the bankrupt's discharge as an obligation enforcible against him.
>
> That some contingent claims are deemed not provable does not militate against this conclusion. The contingency of the bankrupt's obligation may be such as to render any claim upon it incapable of proof. It may be one beyond the control of the creditor, and dependent upon an event so fortuitous as to make it uncertain whether liability will ever attach . . . Such a claim could not be proved under the Act of 1841 although in terms permitting proof of contingent claims. . . . Or, the contingency may be such as to make any valuation of the claim impossible, even though liability has attached. Of this latter class was the claim upon the bankrupt's contract to pay his divorced wife a

specified amount annually so long as she should remain unmarried, proof of which was for that reason rejected in *Dunbar* v. *Dunbar*, [190 U. S. 340].

But the liability of an endorser is of neither class. Its amount is certain; and the contingency of notice of dishonor to the endorser is within the control of the creditor, so as to place his claim, so far as its certainty of accrual and its susceptibility of liquidation are concerned, upon the same footing as the contract of indemnity which was held provable in *Williams* v. *U. S. Fidelity Co.* [236 U. S. 581], although the claimant had done nothing at the time of the bankruptcy to satisfy the liability for which the indemnity was given. . . .

The claim against the endorser of paper not matured at the time of the bankruptcy thus stands on the same plane as contracts of suretyship or guarantee of payment of a debt not due until after the bankruptcy. . . . Even though not due until after the year allowed for proof of claims, if proved in time, such a claim may be liquidated as are other unmatured claims. . . . As the claim is provable, and as notice of dishonor after the petition is filed is necessary only to charge the endorser, in the event he does not secure his discharge, the claimant need not give notice of dishonor in order to share in the estate.

The case was argued by Messrs. Randolph Bias and Wells Goodykoontz for the petitioners and by Mr. Stanley Reed for the respondents.

Carriers — Unjust Discrimination — Allowances to Warehousemen

The making of allowances by carriers to certain warehouses, as compensation for services rendered in loading, unloading, and storing package freight, and assembling the same into carload lots, or in distributing carloads into smaller lots, constitutes unjust discrimination against other warehouses performing similar services without allowances, and is a departure from the tariff rates for carload shipments amounting to the giving of rebates, contrary to the Interstate Commerce Act.

The designation of the favored warehouses as station facilities will not render lawful the making of such allowances, where the carriers themselves, under existing tariffs, could not lawfully perform the services at their own public freight stations.

Merchants Warehouse Co. v. United States, Adv. Op. 692; Sup. Ct. Rep., Vol. 51, p. 505.

The appeal disposed of in this opinion, delivered by MR. JUSTICE STONE, attacked an order of the Interstate Commerce Commission directing the Reading, the Pennsylvania, and the Baltimore and Ohio railroad companies to cease certain practices in connection with their dealings with the appellants.

The appellants are warehouse corporations, some of whose warehouses the carriers have designated as parts of their station facilities. These corporations, under contracts with the carriers, afford facilities and perform services in connection with the loading and unloading of package freight, for which they received stipulated compensation. In the case of the Pennsylvania the compensation is covered by a published tariff.

Six warehouse companies, the appellees, having private rail sidings with the carriers, compete with the appellants and assailed the contracts as unjustly discriminatory and unduly preferential, and the payments made under them as unlawful rebates.

The Commission ordered the carriers to cancel tariff provisions purporting to make the warehouses station facilities, and to cease and desist, making allowances for the loading and unloading. The district court upheld the order and dismissed the petition attacking it.

The opinion dealt chiefly with two issues: (1) Whether the warehouses were in fact public freight stations or were merely so designated by the carriers with the real purpose of compensating the appellants for soliciting the shipment of freight over their lines; and, (2) whether the services rendered by the warehouses are such as may be compensated for by the carriers even though the warehouses are not public freight stations, and if so, whether the carriers may discriminate by making allowances to the appellants and not to others.

The Court, after observing that it assumed that railroads lawfully may contract with others to perform transportation services for them, reviewed the record to disclose the situation found by the Commission to exist here. It appeared that the warehouses are not leased to the railroads; are not regarded or treated by them or the warehousemen as freight stations; and are not held out or generally known as such. The carriers' printed instructions to employees list public freight stations, but list appellants' warehouses as private industries served by private sidetracks. None of the appellants acted as freight agents for the carriers or issued bills of lading. In some instances shipments tendered by persons other than patrons of warehouses were rejected on the sole ground that these were not freight stations, and the shippers were instructed by those in charge to tender the shipment at the carrier's "freight station."

> This and other evidence, which it is unnecessary to review at length, supports the conclusion of the Commission that appellants' warehouses are not in fact public freight stations; that the services performed there by appellants do not differ from those performed by their competitors; and that their designation as freight stations was nominal only, the real purpose being the compensation of appellants for soliciting freight shipments over the lines of the carriers. . . . This evidence distinguishes the present case from the *Arbuckle Case*. [231 U. S. 274], on which appellants rely; . . . The credibility of witnesses and weight of evidence are for the Commission and not for the courts, and its findings will not be reviewed here if supported by evidence.

In dealing with the second aspect of the case MR. JUSTICE STONE first described briefly the services performed by the warehousemen. It appeared that the services begin with the receipt for shipment of outgoing freight and with the unloading of the cars of inbound freight. They end with the loaidng for shipment of outgoing freight and, in case of inbound freight, with the expiration of the 48 hour period of free time during which the carrier allows freight to remain at freight stations without charge, before delivery, or with the delivery, during the period, of freight on the truck platform of the warehouse. After expiration of the 48 hour period, undelivered freight is held by the appellants under agreements with the owners or consignees, or as undelivered freight stored by the carriers for the owners' account.

> During this period, they perform three important items of service, not to mention minor ones which, for present purposes, may be disregarded, but for all of which together the allowances are made. They load and unload cars; they may store the freight or some of it; and, what is of vital importance, so far as the present issues of discrimination and rebating are concerned, they may assemble package freight of less than carload lots and ship it in carloads at carload rates, and distribute or reship, in less than carload lots, a large amount of package freight, carried in carloads at carload rates.

It was pointed out further that carload rates are lower than rates for package freight in less than carload lots, that the carriers may not distribute carload lots in less than carload lots nor assemble smaller lots into carloads, and that carriers confine carload service to shipments of one consignor and one consignee. The

service rendered by the warehousemen thus appeared as one which the carrier itself could not render, and which would nullify its carload tariff rates, if it were performed. Continuing his description of the operation and effect of the arrangement, MR. JUSTICE STONE said:

> But it is a service which inures to the benefit of shippers by securing delivery to them or their customers in less than carload lots of package freight which is transported at carload rates. When rendered, as it largely is, within the forty-eight hours free time, that benefit is without expense to appellants or their patrons since it is included in the service for which the carriers pay. A substantial part of the inbound freight, varying from 35% to 80% at the different contract warehouses, is delivered or shipped from them within the forty-eight hours free time. The amount of the allowances paid during the four years preceding the hearing aggregated more than $809,000; and the conclusion is inescapable that a very large part of the total is for the service of breaking up and distributing carloads in less than carload lots, which the carriers could not lawfully perform at their own public freight stations. Examination of the evidence can leave no doubt that it is the performance of this service, free of charge, to shippers, featured in appellants' advertising and solicitation of patronage, which induces the consignment of freight by shippers to them over the lines of the carriers and withdraws the business from competing warehouses. Such allowances are forbidden, even though paid to appellants and their competitors alike, since, as to both, they would be departures from carload rates of the published tariffs of the carriers and amount to rebates forbidden by §§2 and 3 of the Interstate Commerce Act. . . .
>
> Apart from this consideration, the practical effect of the arrangement with appellants is that the carriers extend, in the form of money allowances to the favored warehousemen, forty-eight hours free time, during which carload freight is unloaded at their places of business, stored, and distributed in less than carload lots, all at the expense of the carriers—a privilege which they withhold from other competing warehousemen and from shippers who maintain their own private warehouses on industrial tracks or private sidings. Granted that the carriers might lawfully undertake to perform or pay for some of these services at warehouses served by private side tracks, they may not extend the privilege to some and withhold it from others. Section 2 forbids the carrier to discriminate by way of allowances for transportation services given to one, in connection with the delivery of freight at his place of business, which it denies to another in like situation.

Finally, the impossibility of avoiding the unlawful discrimination, under existing tariffs, by granting similar allowances to other warehouses was observed.

> For reasons already indicated the case is not one in which, as appellants argue, the carriers should be left free to remove the discrimination by extending the benefit of the allowances to the competing warehouses. Since the allowances are for services which include the assembling and distribution of carloads from or into less than carload lots, the objections to them would not be removed by extending them to some additional shippers of carloads at carload rates, but not to all, nor even to all under existing tariffs and classifications for the handling of carloads. As the Commission found that appellants' warehouses are not public freight stations in fact but are such in name only, it rightly secured the discontinuance of the discrimination by ordering the carriers to cease employing the means by which it had been accomplished. . . . But nothing said here is to be taken as indicating that a carrier may not designate a warehouse as a public freight station and select an agent for its management where a forbidden discrimination is not effected.

MR. JUSTICE ROBERTS took no part in the decision of this case.

The case was argued by Mr. John W. Davis for the Merchants Warehouse Co., et. al., by Mr. John P. Connelly for Philadelphia Warehousing and Cold Storage Co. by Mr. J. Stanley Payne for the Interstate Commerce Commission, and by Mr. John J. Hickey for James Gallagher, et. al.

Railroads—Personal Injuries to Passengers

A railroad company is responsible for the operation of its trains over a section of its main line where it retains control of such section after permitting another company to form a connection as required by statute, and is liable for damages for personal injuries to its passengers resulting from a defective switch at the connection, even though the switch was owned and operated by the other company at the time of the accident.

Southern Railway Company v. Hussey, Adv. Op. 571; Sup. Ct. Rep., Vol. 51, p. 367.

The respondent in this case, a passenger on the petitioner's railroad, obtained a judgment for personal injuries sustained in a collision between one of the petitioner's trains and a train of the Evansville, Indianapolis and Terre Haute Railway Company. The collision occurred at a point where the track of the Evansville Company had been connected with the petitioner's railroad.

An Indiana statute authorized railroads to cross other railroads previously constructed, and required the intersected road to unite with the new one in forming such intersections and to grant certain facilities. The statute also authorized and ratified contracts for running trains of one road over the tracks of another and made the railroad running the trains liable to the same extent as if it owned the tracks.

The connection involved here was constructed under a contract between the two companies which secured to the petitioner control of operations on the main track in the section, and required it to furnish operators, signal men, etc. The Evansville Company's employees while in the section, were to be governed by the petitioner's rules and subject to its superintendent.

When the collision occurred the Evansville Company's train was on a siding about to proceed on the main track when its conductor learned that there was not time enough before the expected arrival of the petitioner's train. A man started to close the switch, but seeing that the signal showed green, indicating that it was safe to proceed on the main line, he did nothing. There was a defect in the switch, however, and it was open so that the Southern train ran over the open switch into the Evansville train on the sidetrack, and injured the respondent.

These facts were held insufficient to relieve the petitioner from liability, and on certiorari judgment against it was affirmed by the Supreme Court in an opinion by MR. JUSTICE HOLMES. He pointed out that the petitioner had not divested itself of responsibility for the condition of its road, even if, under the Indiana statute, it could have done so.

> The petitioner states the question as being whether it is liable for an injury to a passenger caused by the negligence of the employees of the other company in failing to close the switch that connected the two roads, which was installed, owned and operated exclusively by and for the benefit of the Evansville Company; was so constructed, maintained and operated under the compulsion of a statute of Indiana, and was so constructed and operated under a contract expressly authorized by the statutes of Indiana. But this statement needs a good deal of qualification. It is doubtful whether the statute in the word "unite" contemplates more than intersection. It certainly did not require the contract that the petitioner made. The terms of that contract were of the petitioner's own choosing and they gave the paramount authority to the Southern road. As was to be expected the main track remained its own and subject to its control. There is no dispute that the collision was caused by an interruption of the course of the main line through the misplacement of a switch in con-

sequence of a defect in the signal. The Southern road had not abdicated its control over its main line or its ultimate authority over the switch. If, as the jury must have found under the instructions, the defect in the light was not due to a sudden inevitable accident but could have been avoided by care, the Southern road owed that care to the plaintiff, and therefore whether the men immediately in contact with the switch were employees of the Evansville or the Southern Company the Southern was responsible for this condition to the passengers in its train. . . . This case is not of the class concerning the liability of a lessor for injuries immediately attributable to the lessee, but concerns a responsibility for the condition of its road from which the petitioner did not divest itself, even if it could.

The case was argued by Mr. Charles A. Houts for the petitioner, and by Mr. William H. Allen for the respondent.

Indians—Restrictions on Alienation of Property Alloted to Indians—Allowance for Attorney's Fees

The statutory restrictions against alienation of property allotted to Indians do not preclude the allowance and payment of attorney's fees out of the property for services rendered in recovering and preserving such property, held in trust for an incompetent Indian, consistent with the usual practice of courts of equity relating to trust funds.

United States v. Equitable Trust Company of New York, Adv. Op. 829; Sup. Ct. Rep., Vol. 51, p. 639.

In this opinion the Court considered objections made by the United States to certain allowances for attorney's fees, expenses, etc., in a suit brought by a next friend to recover and preserve a trust fund belonging to Jackson Barnett, an incompetent Creek Indian. Barnett had received an allottment out of tribal lands, subject to statutory restrictions against alienation, leasing, etc., except with the approval of the Secretary of the Interior.

In 1912 Barnett was adjudged incompetent, and a guardian was appointed for him. Shortly thereafter, Barnett, described as an incompetent, and his guardian made an oil and gas lease of his lands, with the approval of the Secretary of the Interior. It was provided that royalties thereunder should be paid to a local representative of the Secretary for Barnett's benefit. By 1920 the royalties had produced a fund of about $1,000,000, and about that time the Secretary took over the fund and invested it in Liberty Bonds. An adventuress then kidnapped Barnett and took him into two other states, and in each of them she had him go through a marriage ceremony with her. She then got him to place his thumb mark on a document requesting the Secretary to distribute $550,000 in bonds to her, and a like sum to a missionary society, which was to pay Barnett $20,000 per year for his use for life. Barnett was then about 73 years of age, and the stated annuity was less than the annual interest on the bonds given to the society. The Secretary approved the request and distributed the bonds accordingly.

The guardian, learning of the distribution, sought the aid of attorneys to protect Barnett's interests, and the attorneys informed the Secretary of the Interior of the facts and requested him to act to secure a restoration of the fund. The Secretary, after repeated requests from these attorneys, declined to act insisting that the distribution was valid. The Department of Justice also refused to take any action.

The attorneys then, in 1925, brought suit, through a next friend, to recover and preserve the fund. Subsequently, in 1926, after Mr. Stone, the Attorney General, had advised that it was the government's duty to endeavor to recover the fund, the United States intervened in the suit and assisted in prosecuting it to a successful conclusion. The major part of the burden, however, fell to the attorneys for the next friend.

When the matter of an allowance for fees for the attorneys for the next friend came before the district court, the government opposed the application, on the ground that the statutory restrictions on the fund precluded it. But the court allowed $7,500 for the next friend and $184,881.08 for his attorneys' services and $4,282.92 for expenses, all to be paid out of the trust fund. The circuit court of appeals reduced the allowance for services to $100,000, and sustained other allowances.

On certiorari the making of an allowance was approved, but the amount was further reduced to $50,000. MR. JUSTICE VAN DEVANTER, delivered the opinion of the Court, expressing the view that the statutory restrictions on the fund did not conflict with the general rule in equity permitting expenditures necessary to preserve the fund, including reasonable attorney's fees.

> It is a general rule in courts of equity that a trust fund which has been recovered or preserved through their intervention may be charged with the costs and expenses, including reasonable attorney's fees, incurred in that behalf; and this rule is deemed specially applicable where the fund belongs to an infant or incompetent who is represented in the litigation by a next friend. "Such a rule of practice," it has been said, "is absolutely essential to the safety and security of a large number of persons who are entitled to the protection of the law—indeed, stand most in need of it—but who are incompetent to know when they are wronged, or to ask for protection or redress."
>
> Counsel for the United States concede the general rule, but regard it as inapplicable here. They assume that Barnett's fund was restricted in the sense that it was not subject to disposal in any form or for any purpose, save with the approval of the Secretary of the Interior; and from this they argue that the court by charging the fund with the costs and expenses and requiring their payment therefrom would be disposing of a part of the fund in violation of applicable restrictions.
>
> We make the assumption that the restrictions had substantially the same application to the fund that they had to the land from which it was derived, but we think the argument carries them beyond their purpose and the fair import of their words. Without doubt they were intended to be comprehensive and to afford effective protection to the Indian allottees, but we find no ground for thinking they were intended to restrain courts of equity when dealing with situations like that disclosed in this litigation from applying the rules which experience has shown to be essential to the adequate protection of a wronged *cestui que trust* such as Barnett was shown to be.

As to the amount allowed for attorneys' fees, the Court said:

> While the Circuit Court of Appeals reduced the allowance to $100,000, it stated that $50,000 would have been enough but for the hazard. We think the hazard was small and that the allowance should have been $50,000. The material facts were few and demonstrable; and the applicable legal principles were fairly certain. Of course, there was need for intelligent research and action; but otherwise there was not much hazard. While the record shows that these attorneys did their part well, it also shows that after the intervention of the United States the attorneys of the latter contributed much helpful service. The fund which was recovered was large, and of course this had a bearing on what was reasonable, but it gave no license to go further.

MR. JUSTICE STONE took no part in the decision of the case.

The case was argued by Assistant Attorney General Seth W. Richardson for the Government and by Mr. John W. Davis for the respondents.

Public Waters—Pollution of Waters and Beach by Municipality in Another State—Injunction to Prevent Pollution

A municipality has no right to dump garbage into the ocean, although outside the waters of the United States, when such garbage washes up on the shores and beaches of another state, and there creates a public nuisance. An injunction will issue in such case under the original jurisdiction of the Supreme Court to enjoin the municipality from continuing the nuisance.

State of New Jersey v. City of New York, Adv. Op. 740; Sup. Ct. Rep., Vol. 51, p. 519.

This opinion, delivered by MR. JUSTICE BUTLER, reviewed the report of a Special Master appointed in a suit brought by New Jersey, under the Court's original jurisdiction, to restrain the City of New York from dumping garbage in the Atlantic Ocean off the New Jersey coast.

New Jersey alleged that the garbage dumped into the ocean polluted its waters and beaches and constituted a public nuisance.

The City of New York set up as defense: (1) that it has dumped the garbage at points from 10 to 22 miles from the New Jersey shore under permit from and under supervision by the supervisor of the New York harbor, so that the dumping is outside of the Waters of the United States and of New Jersey; (2) that others dump garbage at places from 2½ to 8 miles from the shore so that it is impossible to determine that the injury alleged is chargeable to the defendant; and (3) that the complaint fails to state facts sufficient to entitle the plaintiff to any relief.

The opinion states the substance of the Master's findings, but they may be summarized briefly here. It was found that the City of New York dumps vast quantities of garbage into the ocean, and that much of this is washed up on the New Jersey shore, making bathing impracticable and injuriously affecting the business of fishing. For about 20 years prior to 1918 New York City disposed of its garbage by a reduction system, but upon destruction of a plant in 1917 and the failure of a contractor, it obtained permission from the Supervisor of the harbor to dump garbage into the ocean. The supervisor of the harbor, since 1918, has reported annually to the chief of engineers that garbage is likely to wash up on the beaches no matter what distance from the shore it may be dumped.

The Master concluded that the method of dumping garbage into the sea was not a proper way to dispose of it, but that it should be disposed of by incineration, or the "reduction method." He also found that garbage reaching the shore from vessels and dumpings of others was negligible compared with that constantly dumped by the defendant. A finding was made that the defendant had delayed unreasonably in providing incinerators, although its mayor and other representatives had been informed for years that the practice of dumping created a nuisance along the shore. Accordingly a decree was recommended as prayed for.

The Court found the Master's findings were amply sustained by the evidence, and ordered that a decree be entered, but allowing a reasonable time to the defendant to provide other means of garbage disposal. The defenses set up by the defendant were found to be without merit. As to them, MR. JUSTICE BUTLER said:

> "Defendant contends that, as it dumps the garbage into the ocean and not within the waters of the United States or of New Jersey, this Court is without jurisdiction to grant the injunction. But the defendant is before the Court and the property of plaintiff and its citizens that is alleged to have been injured by such dumping is within the Court's territorial jurisdiction. The situs of the acts creating the nuisance, whether within or without the United States, is of no importance. Plaintiff seeks a decree in personam to prevent them in the future. The Court has jurisdiction. . .
>
> There is no merit in defendant's contention, suggested in its amended answer, that compliance with the supervisor's permits in respect of places designated for dumping of its garbage leaves the Court without jurisdiction to grant the injunction prayed and relieves defendant in respect of the nuisance resulting from the dumping. There is nothing in the Act that purports to give to one dumping at places permitted by the supervisor immunity from liability for damage or injury thereby caused to others or to deprive one suffering injury by reason of such dumping of relief that he otherwise would be entitled to have. There is no reason why it should be given that effect.
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> The Master's conclusions of law and recommendations for a decree are approved.

The case was argued by Mr. Duane E. Minard for New Jersey and by Mr. Arthur J. W. Hilly for New York City.

Railroads—State Railroad Commissions—Power to Compel Construction of Union Passenger Stations

The Interstate Commerce Act, as amended by the Transportation Act of 1920, requires the issuance of a certificate of public convenience and necessity by the Interstate Commerce Commission requiring the construction and permitting abandonment of lines incidental to the construction of a union passenger station, as a condition precedent to the validity of an order of a state railroad commission requiring the construction of such a station.

Congress has not by legislation, displaced the states in the entire field relative to the construction of railroad stations, and the states have power, by reasonable orders, to require the construction of union passenger stations, upon the granting of an appropriate certificate by the Interstate Commerce Commission relating to the construction and rearrangement of incidental lines and facilities.

Atchison, Topeka and Santa Fe Railway Co. v. Railroad Commission of the State of California, Adv. Op. 733; Sup. Ct. Rep., Vol. 51, p. 553.

In this opinion, delivered by the CHIEF JUSTICE, the Court considered appeals from judgments of the Supreme Court of California, which affirmed an order of the California Railroad Commission requiring the appellant railroad companies to construct a union passenger station, with incidental connections and facilities.

The proceedings out of which the questions here arose extended back to 1916. At that time proceedings were commenced before the State Railroad Commission, which in 1921, after two hearings, made an order requiring the removal of certain grade crossings and the erection of a union terminal. The state Supreme Court held that order beyond the power of the Commission, because the transportation Act of 1920 had committed the subject matter to the Interstate Commerce Commission. This ruling was affirmed by the Supreme Court, 264 U. S. 331, upon the ground that the relocation of the tracks, incidental to construction of the station, required a certificate of public convenience and necessity under Sections 18-21 of Section 1 of the Interstate Commerce Act, as a condition precedent to the validity of action by the carriers

or of any order of the State Commission in that regard.

Meanwhile, the City of Los Angeles applied to the Interstate Commerce Commission for an order requiring the building of the station. That Commission concluded that it was without jurisdiction to make such an order, but, to facilitate disposition of the case, it made hypothetical certificates declaring that the public convenience and necessity required the extensions of lines to reach a station constructed in accordance with a lawful order of the State Commission, and permitted the abandonment of certain incidental service and lines. It also found that the expense involved would not impair the carriers' ability to perform their duties to the public.

Proceedings were then reopened in the State Commission to which the Federal Commission's action was submitted. After hearings, the State Commission made the order considered in this opinion, requiring erection of the station in substantial compliance with the plan outlined, similar, in all essential respects, to that considered by the Federal Commission.

The City of Los Angeles then presented the matter again to the Interstate Commerce Commission. The latter adhered to its previous conclusions relating to the relocation of tracks and the abandonment of certain lines incidental to the construction of the station, but it denied a petition for an order by it requiring construction of the union terminal.

Application was then made to the Supreme Court for the District of Columbia for a writ of mandamus compelling the Interstate Commerce Commission to consider the evidence introduced regarding the building of the station and thereafter to make such order as the facts required. This finally resulted in a ruling by the Supreme Court that the Commission had no jurisdiction to require construction of the station, and the application for a writ of mandamus was dismissed. 280 U. S. 52.

Thus, after a decision that the State Commission cannot require erection of the station without a certificate of public convenience and necessity from the Federal Commission, for the relocations and abandonments of incidental tracks, and after a decision that the Interstate Commerce Commission's jurisdiction stops short of authority to compel construction of the union station, the question is presented here whether, after appropriate action by the Federal Commission, the State Commission can compel erection of the terminal.

> The questions presented are solely those of constitutional authority. All questions of fact as to public convenience and necessity, and as to the practicability of the proposed plan, have been resolved against the Railway Companies by the proper tribunals. This Court has held that the State Commission could not require the construction of the proposed station, and the relocation of connecting tracks, without the approval of the Interstate Commerce Commission. That approval has been given. This Court has also decided that the Interstate Commerce Commission has not been empowered to require the building of the station. That Commission has not attempted to exercise any such authority. The question now is as to the authority of the State Commission, in view of the action of the Federal Commission, to require the construction of the station with the incidental arrangement of tracks and facilities. The decision of the State court is conclusive so far as the constitution and laws of the State are concerned. The State Commission has acted within the power conferred upon it. The only questions before us are those arising under the Federal Constitution and the Interstate Commerce Act.

The first contention considered in the opinion was that the order of the State Commission is invalid, because Congress has occupied the field. In disposing of this argument the Court pointed out that it presupposed authority in the state to require erection of the station, unless exercise of the power had been precluded by congressional action. Nothing was found to indicate that Congress intended to displace the state's authority in this regard.

> The considerations which led the Court to the conclusion that the power to compel the construction of such terminals had been withheld from the Federal Commission also make it clear that the authority which resided in the State had not been taken away except to the extent that the approval of the Federal Commission was required. The principle thus applicable has been frequently stated. It is that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the State of its authority as to matters not covered by the Federal legislation is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the State. . . We find no such conflict in this case, as the approval of the Interstate Commerce Commission has been obtained and its certificate of public convenience and necessity has been issued, in relation to the rearrangement, extensions and abandonment of tracks, and the use of the terminal facilities, involved in the proposed plan, and nothing further was required by the Interstate Commerce Act.

The carriers further contended that the certificates of the Interstate Commerce Commission were void, because not issued on their application, but in proceedings adverse to them, contrary to the provisions of paragraphs 18 to 20 of Section 1 of the Interstate Commerce Act, and were unauthorized under paragraph 21 of that section. This construction of the statutory provisions was rejected.

> The approval of the Interstate Commerce Commission and the issue of its certificate of public convenience and necessity being indispensable under the Act, application could properly be made by the authorities of the State, assuming that with such certificate they were entitled to require the establishment of the station.

In conclusion, consideration was given to the contention that the order deprives the railroads of their property without due process of law and denies to them the equal protection of the law contrary to the Fourteenth Amendment. An examination of the proposal presented here, the expense involved, and the public necessity disclosed no ground for holding the order invalid. The applicable principles were thus stated:

> The principle that the State, directly or through an authorized commission, may require railroad companies to provide reasonably adequate and suitable facilities for the convenience of the communities served by them, has frequently been applied. . . . Railroad carriers may be compelled by state legislation to establish stations at proper places for the convenience of their patrons. . . . They may be required at their own expense to construct bridges or viaducts whenever the elimination of grade crossings may reasonably be insisted upon, whether constructed before or after the building of the railroads. . . But the power to regulate is not unlimited. "It may not unnecessarily or arbitrarily trammel or interfere with the operation and conduct of railroad properties and business." . . . The question in each case is whether, in the light of the facts disclosed, the regulation is essentially an unreasonable one. . . . And "the matter of expense is an important criterion to be taken into view in determining the reasonableness of the order."

MR. JUSTICE MCREYNOLDS was of the opinion that the judgment should be reversed upon the ground that the challenged order was arbitrary, unreasonable, and beyond any power which the State is competent to confer.

The case was argued by Mr. C. W. Durbrow for the appellants, by Mr. Arthur T. George for the appellees.

WHEN MAY A POLICE OFFICER SLAY IN MAKING AN ARREST?

By Thomas H. Franklin
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THE above title probably does not correctly state the subject to be discussed. A better statement would probably be, "When is an officer justified or excused in slaying when attempting to make an arrest that he is legally authorized to make."

This subject was considered somewhat at the late meeting in Washington of the American Law Institute, but no final action was taken thereon. The discussion largely took the shape of the mentioning of occurrences rather than a consideration of the subject in logical generalization. The related occurrences merely served to show the difficulty of establishing a set rule applicable to varying circumstances in different locations having varying conditions of law, obedience and enforcement.

Every person, in this country at least, is theoretically entitled to his life, his liberty and his property. In the defense of these he has the right to slay and that without retreating when, under circumstances as they appear to him, the slaying is necessary for the protection of his life, the prevention of serious bodily injury, or the protection of his liberty or his property. That right, of course a peace officer has as a private citizen independent of his official position. The question of when the right is qualified by some act of the slayer inducing the danger need not be considered here.

The right may be forfeited either to the State by the commission of a crime, or to one of its police officers when undertaking to lawfully make an arrest. If the State claims the forfeiture it must establish it against the offender, if he has been put in arrest, by a trial conducted with certain legal formalities.

If the forfeiture be claimed by a police officer, the burden is upon him to show either that he acted in self defense or that being legally authorized to make an arrest he killed, in the performance of his duty owed to the State, in the enforcement or attempted enforcement of its laws, and that it was necessary under the circumstances, as they appeared to him, to slay in order to perform that duty.

If the State does not believe the killing justified or excused the officer may himself be put on trial and the question be determined under appropriate procedure.

Is there any reason for any rule save that an officer may slay in self defense or where necessary, under the circumstances as they appeared to him, to perform his duty to the State? Of course, I refer to cases only where the party whose arrest is attempted is charged with or engaged in the commission of a felony. If an officer be too much restricted in the performance of his duty to make arrests crime will be encouraged. All criminals fear the law—it is something that they can neither shoot, stab nor choke to death—what they do not fear is the administration of the law if there is laxity in administration.

Criminals do not wish to be killed and if confronted by a fearless officer having the right to kill and skilled in the use of arms and who they know will exercise that right if necessary, they will be very much inclined to offer no resistance. A well authenticated incident may serve to illustrate the foregoing statement: a man charged with the commission of a very grievous offense was placed in jail. The jailyard was surrounded by a fence and the entrance to the yard over the fence was by steps extending from the outside to a top platform and then down to the ground on the inside. A mob was assembling to take the prisoner. An officer lounged down and took his seat on the platform of the steps. He had his Winchester Rifle, which he placed across his lap, He then took out a sack of Bull Durham tobacco and a package of cigarette papers and laid them down on the platform next to him. He then began to casually roll a cigarette, saying nothing to the mob that had then assembled. Every member of the mob knew that in the barrel of the Winchester was a cartridge and in the magazine were fifteen more. They knew that the officer was a dead shot and that if they advanced upon him it meant that certainly one of the crowd would be shot and that probably fifteen more would be dropped in their tracks as the cartridges from the magazine were thrown into the barrel and fired. No one knew however who of them would be killed; none of them wished to be killed. The mob hesitated; the officer continued to sit still, saying nothing and quietly smoking his cigarettes as he rolled them. In a short time the mob retired and the officer quietly lounged away from his guard-post. Here the law was triumphant for its execution was represented by a single officer who knew how to shoot and who would shoot if the necessity arose for him to shoot and the mob yielded to the law as personified in the officer.

It may be contended that the rule suggested hereinbefore leaves too much discretion in an officer; but the discretion must be lodged somewhere and if not lodged in the officer, then where should it be lodged? When does any man who has not at some time had to confront danger from some lawless character know when such danger becomes so imminent that he should act? The trained officer knows that the immediate intent to kill by one he seeks to arrest may be flashed from his opponent's eyes and the message will be as definite as the rattle of a snake before it strikes, and in such instance he cannot wait a moment if he would protect his own life. The trained officer also knows that if a man he is seeking to arrest draws a weapon but does not immediately shoot that the chances are that he is bluffing or playing for a parley and that the necessity to shoot has not yet arisen and that the arrest may be made without

the firing of a shot and he therefore does not fire. It is a common frontier expression that if a man intends to shoot he draws his gun "a-smoking." When Pat Garrett entered the house where he expected to find "Billy, the Kid" he knew that the "Kid" would shoot him on sight. When, therefore, the "Kid" called out in Spanish who is there, Garrett had to shoot to sound for if he had either answered and given the "Kid" a chance to shoot to sound or he had said nothing, the "Kid" would have located and killed him.

Of course, there are instances where an officer may kill unnecessarily, either because he is nervous or because he is not experienced. There are instances however where a man kills in apparent self defense but has misjudged the movements and conduct of his opponent. Does that furnish any reason however why the law of self defense should be restricted or abolished? How many killings by an officer in making an arrest occur in this populous country every year? Is it not a fact that the vast majority of the citizens of this country rely upon the very few officers in comparison with that majority to protect them in their rights of life and property? If one goes into any city in the United States a stranger thereto and is insulted or assaulted on the streets and there is a policeman in sight, is it not a fact that he immediately unhesitatingly calls upon the policeman for protection and that as a rule, almost without exception, he gets it. If we have officers in whose discretion we cannot place reliance, then we should get rid of them and not hamper the officer in whom we can impose trust in the performance of the trust. It is also true that when an officer slays under circumstances that neither do nor should excuse or justify him, the incident is made the basis of neurasthenic propaganda restricting an officer in the execution of his duty. But we still come back to the proposition that the restriction demanded will be more injurious to the public than beneficial. Cases arise where some green youth ambitious for notoriety as a dangerous man or someone who imagines that it is necessary for him to carry a weapon sticks a 22 pop gun on his person in violation of the law and when an attempt is made to arrest him makes a demonstration of resistance. In such instances an untrained and nervous officer may shoot when he should not, but the trained officer holds his fire, takes the pop gun and arrests the man. If such a man is shot by an officer, does not he bring about the shooting by his own conduct?

Law enforcement is a practical thing. It cannot be accomplished by mere changes in procedure or by fine spun theories evolved from a professor's study or in the office of a lawyer who has had no practical experience in the administration of the criminal law or from a newspaper editor's desk. Such theories complicate and do not enforce the law. In the practical administration of the criminal law the personal equation is an essential factor, and effective law enforcement at last is dependent upon efficient Judges, Prosecuting officers and police officers. With such officers any law can be effectively enforced in any community; not immediately perhaps but certainly ultimately. But no law can be enforced in any community where judge, prosecuting officer or police officer publicly announces that it cannot be enforced, nor where judge, prosecuting officer or police officer does not wish it to be enforced. Where any law in any community is not enforced there must be protection extended to the violators thereof either by judge, prosecuting officer or police officer, or some or all of those officers must be incompetent or lacking in courage.

If in considering the administration of criminal justice we are to differentiate in enforcement between so-called popular laws and unpopular laws, we cripple the enforcement of all laws, encourage the violation of some and enable the criminal to justify himself in a commission of violation of some laws because they are not popular, and thus break down the enforcement of all laws. The unconvicted criminal is generally a voter and frequently a local power in politics and is diligent in seeking to secure a "friend at court," and not infrequently he may be aided in his efforts so to do by the open encouragement or the secret approval of those who reserve as a right the determination by them as to what laws should be obeyed and what disobeyed.

Robbers, burglars, rum-runners and others of that ilk are potential murderers. They arm themselves when committing crime with the purpose to slay whoever interferes with them in its commission or in attempting their arrest after its commission. That every trained police officer knows, and he knows that he must be at all times upon his guard when he attempts to arrest any of such criminals. If he hesitates to act when action is demanded he offers himself up as a sacrifice and may be rewarded by a largely attended funeral, but he has accomplished nothing towards the enforcement of the law or the execution of the trust imposed upon him by the official position he occupies. He is entitled to more consideration by the public than he usually gets.

I know little of officers in the large cities, but I do know that it was the frontier Sheriff and the Ranger who by their courage, their endurance, and their patriotism moved the frontier line on to the borders of the State, and gave to each citizen that security of life and property that he now enjoys.

Non-Political Judges

"Proposals that the Rochester Bar Association act to prohibit judges from political activity, obviously are so right that formal action should not be required for their acceptance.

"Every lawyer knows—and every judge is certainly aware—that the founders of this government placed safeguards about the judiciary that were designed to keep it out of politics. And if they had not, then ethics should dictate such a course to every jurist.

"Justice knows no partisanship; there can not be one brand of it for Republicans and another for Democrats. And the judge who would make it clear that he subscribes to that established principle will divest himself of political activity without waiting for any organization to ask him to do so."—*Rochester (N. Y.) Journal-Post-Express.*

WOMAN IN ISLAM

Reciprocal Rights and Duties of the Eastern Husband and Wife Place Upon the Woman No Charge, Submit Her to No Disability and Make No Demand Upon Her Which, if Carefully Analyzed, Places Her in a Position Inferior to Her Western Sister

By Hon. Pierre Crabitès
Judge of the Mixed Tribunal, Cairo, Egypt

AT Muhammadan law marriage is a matter of contract, the terms of which depend, within very wide limits, on the will of the contracting parties. This contract must be legalized by the QADI, or Judge, and the Muslim husband must pay over a dower to his wife before the QADI is permitted to countersign their agreement. No other formality is requisite and no religious ceremony of any kind is necessary.

It is not lawful for a woman to have two or more husbands at the same time. She is further bound to observe an interval, called IDDAT, between the termination by death or divorce of one matrimonial alliance and the commencement of another. It is lawful, however, for a man to have as many as four wives at a time, but not more; the right of having concubines no longer obtains, as slavery has been abolished.

The wife, however, or those negotiating on her behalf, can make it an express term in the marriage contract that the husband shall not take a second wife, or that if he does she shall have the option of divorce.[1] When the Muhammadan wife can and does insert into her marriage contract such a clause, and when such a provision is declared by competent authority to "be usual nowadays among Mussulmans even of the polygamous sect,"[2] it is folly to speak of polygamous relationship being thrust upon a Muhammadan woman. On the contrary, it is clear that the Oriental woman has it in her power to protect herself from any situation which may be distasteful to her. In fact so carefully has Muhammad laid the foundations which protect her legal and social rights, that the High Court of Calcutta has said that "We are aware of no reason why an agreement entered into before marriage between persons able to contract, under which the wife consented to marry on condition that, under certain specified conditions, all of a reasonable nature, her future husband should permit her to divorce herself under the form prescribed by Muhammadan Law, should not be carried out."[3]

Economic reasons and other concomitant circumstances have practically driven polygamy from the urban life of the Muslim world. The same causes fail to obtain in purely agricultural districts. The simplest observation will confirm, however, that throughout the world farmers almost invariably have large families. In countries where polygamy is allowed, farmers therefore, not only seek to add to their supply of children by increasing the number of their wives, but they find a means of reducing their pay-roll by augmenting their staff of permanent female coadjutors.

It is in this sense that Frazer writes that when a Catholic priest remonstrated with the Indians of the Orinoco on allowing their women to sow the field in the blazing sun, with infants at their breasts, the men answered, "Father, you don't understand these things, and that is why they vex you. You know that women are accustomed to bear children and we are not. When the women sow, the stalk of the maize bears two or three ears, the root of the Yucca yields two or three basketfuls, and everything multiplies in proportion. Now why is that? Simply because the women know how to bring forth, and know how to make the seed which they sow bring forth also. Let them sow, then; we men don't know as much about it as they do."[4]

The reciprocal rights and duties of the Eastern husband and wife place upon the woman no charge, submit her to no disability and make no demand upon her which, if carefully analyzed, tend to place her in a position inferior either in dignity or power to that enjoyed by her Western sister in respect to her Western husband.

It has already been said that an essential requisite to the validity of a Muhammadan marriage is that the husband must confer a dower upon his wife. The amount of this marriage settlement must be "reasonable with reference to the means of the husband and the status of the wife," otherwise it is the duty of the QADI to refuse to countersign their marriage contract. It is usual to stipulate that a portion of the dower shall be "prompt," i. e., payable on demand and before the bride leaves her father's home, and the remainder "deferred," i. e., payable only on termination of the marriage by death or divorce. Nevertheless, while it is the duty of the QADI to assure himself that the "prompt" payment at least equals the irreducible minimum just defined, the contracting parties enjoy the widest conceivable latitude as to the mode of settlement of the "deferred" installment.

In addition to her right to recover the amount of her dower by regular suit, the wife may refuse to receive her husband's embraces, to obey his orders, or even to live in the same house with him, so long as it is unpaid; and this without forfeiting anv right to be maintained at his expense or her right of inheritance as his wife.[5]

Subject to the above mentioned right of refusal for non-payment of dower, and in the absence

1. Wilson—Digest of Anglo-Muhammadan law, page 61.
2. Wilson op. cit. page 143 quoting Ameer Ali, M. L. vol. II, P. 171.
3. Wilson op. cit. page 142.
4. Frazer—The Golden Bough—Part 1 the Magic Art—Vol. I Page 141.
5. Wilson—op. cit. page 123.

of a clause in the marriage contract to the contrary, the wife is bound—

(a) to reside in the house of the husband, but not necessarily to follow him about from place to place wherever he may choose to travel:

(b) to receive her husband's embraces whenever required at reasonable times and places and with due regard to health and decency:

(c) to obey all his other reasonable commands: and

(d) to observe strict conjugal fidelity from the time of the marriage contract (whether the dower has or has not been paid) and to refrain from all undue familiarity with strangers and all unnecessary appearance in public, it being well understood that what is undue familiarity or unnecessary publicity will depend in each case partly on the social position of the parties, and partly on local customs.

The idea is prevalent in the Occident that the Oriental woman is a toy made to pander to the pleasures of man, and that she is at best nothing but a human incubator or a purveyor to the lacteal needs of infancy. It is, therefore, worthy of note that the obligations of a wife do not include, except in urgent necessity, the most elementary duty of a mother, that of suckling her own children. "If the child be an infant at the breast, there is no obligation on the mother to suckle it, because the infant's maintenance rests upon the father."

The various duties incumbent upon the wife require no further elucidation. It can not be said that they throw upon her shoulders a burden unknown to the West. In these twentieth century days of progress and equality it does appear incongruous to speak of a wife's being "bound to obey all other reasonable commands of her husband." Nevertheless, it must not be forgotten, when this criticism is made, that in 1840 Victoria was Queen of England, and in 1846 Isabella II ruled over Spain. When these two sovereigns were led to the altar they both swore "to love, honor and obey." As long as such marital vows continue to underlie the superstructure of Christian civilization, it would ill become a Western woman to seek to draw an argument from the language quoted.

The Muslim husband not only may insist upon obedience to all reasonable commands but the unmodified Muhammadan law clearly recognizes his right to inflict moderate personal chastisement, for the Quran says: "Those whose perverseness ye fear, admonish them and remove them into bed chambers and beat them; but if they submit to you, then do not seek a way against them."

Such a principle is inherently wrong and cannot be condoned. But when the outraged civilization of the West is seeking for language wherewith to castigate the East let it be remembered that at Common Law "the husband hath by law power and dominion over his wife and may keep her by force within the bounds of duty and may beat her, but not in a violent or cruel manner."[6]

In Islam modern conditions have intervened which make the old Quranic law obsolete. The Egyptian code of Hanafite law (art. 209) permits the husband to inflict on the wife "a moderate disciplinary penalty" when she commits a fault or reprehensible act for which the law has not prescribed any legal penalty; but declares that he must never use violence towards her, even on grave provocation. "A husband" says Clavel "may be imprisoned if he resort to violence; no wrongful act on her part can justify or palliate his brutality. The Court of Appeals of Algiers some years ago, handed down a decree of divorce against a husband who violently struck his wife when he had surprised her receiving the embraces of another man." As this treatise is not concerned with the rights of Woman at Common Law, it is without interest to inquire as to whether the archaic rule sanctioning wife-beating is still a priceless heirloom of Anglo-Saxon liberty.

Muhammadan men and women, in exclusively Muhammadan countries, where no veneer of European culture has crept in, marry shortly after they attain the age of puberty. Prostitution is inexistent in such districts and the immunities of Knight-Errantry are unknown to the gilded youth of the land. Men must marry or remain continent and when they marry, whatever may be the latitude polygamy affords them, they must continue to live a life of continence within the limits allowed them by law, if for no other reason, at any rate because their civilization is so adjusted that there are no pastures where they may graze or cozy corners where affinities may be discovered. The rule is even carried so far that sexual incontinence by man or woman, whether married or single, incurs severe penalties.

A practical check on adultery results also from the leniency with which the law regards homicide by an injured husband. A venerable cheik, Aboo Jaafar Hindoanne, when asked whether a man, finding another in adultery with his wife, might slay, replied, "If the husband knew that expostulation and beating will be sufficient to deter the adulterer from a future repetition of his offence, he must not slay him, but if see reason to suppose that nothing but death will prevent the repetition of the offence, in such case it is allowed to the husband to slay that man; and if the woman were consenting to his act, it is allowed to her husband to slay her also."

Against this tradition may be set another which represents the Prophet as expressly forbidding such self-revenge; though it is true that it goes on to point out that the follower of the Prophet, to whom the prohibition was addressed, openly protested that he would disregard it if the occasion arose, and was left off with a surprisingly mild rebuke for his audacity. This story is told by Muhammadan law writers in such a manner as to convey the impression that the killing of an adulterer is considered to be wrong but yet so natural as hardly to deserve punishment.

Blackstone wrote, speaking of the law of England that "the very being or legal existence of the wife is suspended during marriage, or, at least is incorporated and consolidated in that of her husband." No such rule is known to the Levant. There the Muslim wife, in so far as her property is concerned, is as free as a bird. She, polygamous wife though she be, can do with her financial interests what she pleases without consulting her husband. Her rights of administration are plenary, and it may be said, as a general rule, that the same conditions obtain as to alienation. In all such matters the husband has no greater rights than any perfect stranger. Her juridical situation is the

6. Eversley—Law of Domestic Relations. Page 173.

very converse of the wife described by Blackstone.[7]

It is now time to pass to a consideration of the legal remedies of the wife against her husband. It is provided that:

(a) She may sue him in a court for maintenance and the decree may be enforced by attachment of his property or by imprisonment or both; and in case of his absence, and of there being no conveniently realizable property, the court may authorize her to borrow money on his credit.

(b) In case of actual or threatened violence of a serious kind (and possibly in case of gross violation on his part of the conjugal obligations imposed by Muhammadan Law) she may refuse to live with him without rendering herself liable to a suit for restitution of conjugal rights.

(c) Having so ceased to reside, or having been turned out, or deserted, she may obtain from a magistrate an order for maintenance.

(d) She has, along general lines, the same remedies, civil or criminal, that any stranger would have against any acts which would amount to Hurt, Criminal Force or Wrongful Restraint, under the Penal Code.[8]

Comment is useless. Everyone of these remedies given to the wife is thoroughly consonant with the most advanced standards and is supplied with a wealth of teeth, obtuse, numerous and arranged in several rows, which recall rather the death grinding dentition of the shark than the pearl-like whiteness of those soft baby teeth which sometimes adorn the remedial legislation of the modern world.

The husband is bound:

(a) To maintain his adult wife in a manner suitable to his wealth, or at least to the mean between his wealth and hers if she be poorer, quite irrespective of her ability to maintain herself out of her own property, so long as she is undivorced and obedient, and whether obedient or not, if she has the right of refusal for non-payment of dower.

(b) If he has more wives than one, to provide each with a separate sleeping apartment, to give to each as far as possible an equal share in his society and equal treatment in other respects.

(c) In any case to allow her the use of an apartment from which she may exclude all persons except her husband himself.

(d) To allow her to visit and be visited by her parents, or children by a former husband, with reasonable frequency and to allow her to visit and be visited by her own blood relations (within the prohibited degree) at least once a year. He is, however, under no legal obligation to allow her to visit, or to be visited by strangers or to go out to marriage feasts, public baths and the like.

It would serve no useful purpose to analyze these duties incumbent upon the husband; not that they will not bear comparison with standards fixed by Christendom, but because in Islam the rights and duties of husband and wife depend upon the terms of the marriage contract and may be defined in any manner agreed upon between the parties. If they prefer not to contract, the duties of a husband are as they have been enumerated; otherwise the case is different.

It is perfectly possible that the girl who knows nothing of life may neglect to take advantage of her rights, but, when her parents have within their reach such a beneficent rule of civil conduct as was prepared by Muhammad, no girl has aught to fear from marital pressure. The Prophet brought the women of his land to the fountain. He prepared for them a well, bubbling with sparkling water. He can not make them drink thereof if they do not desire to do so.

The divorce laws of Islam deserve careful study: particularly as their text has inspired many burning criticisms of Muhammadanism. It is a fact that the husband may divorce his wife at his mere will and pleasure and without assigning any reason. It is a fact that he may repudiate her. It is a fact that the wife can never divorce herself from her husband without his consent, though she may, under certain conditions, obtain a divorce by judicial decree.

Inasmuch, however, as the terms of the marriage contract agreed to before marriage constitute, to all intents and purposes, the law which binds husband and wife, the woman can rid herself of her husband practically as easily as he can do away with her.

There are several kinds of divorce at Muhammadan Law; to attempt to draw the necessary distinction between them would serve no useful purpose, as it is the right of repudiation accorded to the husband that has always incited the bitterest ire of well-intentioned but poorly informed critics of the Orient. It is therefore emphasized that the husband may confer a power of repudiation on his wife or some third party, and a divorce will take effect if, and when, the power so conferred is exercised. A stipulation set forth in an agreement between the spouses that the wife be allowed to divorce herself in certain contingencies is valid if the contingencies are such as would render the step a reasonable one. It seems to be immaterial whether such an agreement is ante-nuptial or post-nuptial.

If it be clear that, for all practical purposes, both man and woman may take advantage of the obnoxious divorce laws of the Orient, which therefore do not create any inequality between the sexes, it is well to recall that the Prophet said that "of all permissible things or acts, repudiation is that which God holds in greatest abhorrence."

In the law in respect of Dower rights the Prophet gave woman a means of protecting herself against repudiation. He there decreed that no man could marry a woman without conferring upon her a settlement, the amount of which "shall be reasonable with reference to the means of the husband and the status of the wife," and he then founded a custom which provided that one-half of this dower shall be payable "on demand" and the remainder on the termination of the marriage by death or divorce. In other words, Muhammad established a tradition which made it necessary for a man to go down into his pocket before doing away with his wife, and thus made sure that the husband will "stop, look and listen" before repudiating his spouse.

It may be argued, however, that a Muslim woman, notwithstanding her transcendant property rights and her well defined legal attributes as to divorce, may be so cowed by her husband as to be unable to make use of her juridical prerogatives. Muhammad foresaw this and his law therefore provides that the husband may confer a power of repu-

7. Clavel op. cit. vol. I. sec. 217 et seq.
8. Wilson op. cit. Page 131 et seq.

diation on his wife or on some third person. A prudent father, accordingly, often sees that a clause of this sort conferring upon himself this power of repudiation is written into his daughter's contract of marriage and thus the cajolery of the husband cannot defeat the purposes of the law if a far seeing mind has presided over the drafting of the initial pact.

As a matter of fact this power of committing repudiation to another has taken eccentric forms. Instances given of delegation to a third person are:

(1) the very curious one of a debtor permitting a creditor to repudiate his (the debtor's) wife in the event of the debt remaining unpaid, the case contemplated being apparently that of a creditor coveting his debtor's wife, and proposing to marry her when divorced; and

(2) permission to one of two or more wives to divorce a rival wife.

What is known as an irrevocable divorce is obtainable at Muhammadan law in a manner so simple as not to constitute any real formality whatsoever; the procedure is so elementary and so rapid as to bring the blush of shame to the cheek of the modern legislator. Such a divorce may be effected by words, clearly indicating as intention to dissolve the union. These words may be pronounced, among other ways, three times in rapid succession or once by words indicating a clear intention that the divorce shall immediately become irrevocable. All the husband has to say to his wife is: "I divorce thee," "I divorce thee," "I divorce thee" (three times) and she is divorced. This triple pronouncement form of divorce is the procedure usually followed.

Abuses sprang up during Muhammad's days which are typical of certain ultra-modern tendencies and in order "to arrest the scandal of indefinitely repeated divorces and remarriages, which had become frequent in Arab Society, and were opposed to the interests of public morality," he adopted a very simple device. He did not repeal the law; he simply amended it by adding one of those little provisos which means so much and which experienced lobbyists interpolate so innocently and so surreptitiously into otherwise innocuous bills. He merely required that if the divorce took the form which has just been referred to, the divorced couple may not remarry, unless and until the woman has been married to another man and divorced by him after consummation. No presumption as to the fulfillment of this condition can be drawn from the mere fact of remarriage.

It sometimes happens that early love is rekindled and the divorced man and woman desire to remarry. A stumbling block presents itself. The love of the man is inflamed, his jealousy aroused, the law obdurate and no dispensation obtainable. His former wife he must have; the cup of experience he has drained to the dregs and nothing will soothe his soul but the embraces of the wife of his youth. Love laughs at bars, and all is fair in love and war, but the Prophet was a discerning seer and can not be imposed upon.

He, therefore, ordained that no man may validly remarry such a former wife unless it be proven that she has remarried and that four months have elapsed since her new divorce. The impatient prospective bridegroom must therefore first find another husband, who is physically capable of consummating this "intermediate" marriage and who, at the same time, is sufficiently repulsive in form as not to be able to win the heart of the lady. It is said that hump-backed men usually answer the necessary requirements and they are therefore often called "intermediate husbands." This, parenthetically, is the origin of the prevalent opinion that "hump-backed men are lucky." It explains why the best vendors of lottery tickets are hump-backed men.

There is a feature of the law of parentage which shows the angle from which Muhammadanism views the rights of woman. Most systems set forth presumptions as to lawful paternity. The ex-King of Spain is a posthumous child. His father Alphonso XII died November 24, 1885, and Alphonso XIII was born May 17, 1886. His legitimacy neither could nor would be open to doubt in any country or in any age. Legislation, however, is not uniform in a matter which might mean so much to a woman and to an innocent child. Muhammad, who died without leaving male issue, did not leave the woman of his land at the mercy of the caprices of a calendar. He fixed the superior limit of lawful paternity at two years for "Aboo Huneefa had it from Ayeshah, who had it from the Prophet himself, that a child remains no longer than two years in the womb of its mother, even so much as the turn of a wheel."

It is all very well to say that Muhammad knew nothing of physiology. He probably was densely ignorant of its intricacies, but he knew enough of the question to be certain that his two years' rule would protect innocent women from mischievous mathematicians who never hear of the birth of a first-born or of a posthumous child without tabulating dates.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

A Treatise on the Doctrine of Ultra Vires, by Howard A. Street. 1930. London: Sweet and Maxwell Pp. lxxxviii, 591.—It would be difficult within the scope of a review to do anything like justice to this book. Founded on the divisions of Brice's well-known work it is nevertheless a new and challenging book. Indeed, it is no exaggeration to say that it is one of the most important contributions made to legal literature within recent years, without which a lawyer's library will remain somewhat incomplete. Its width of learning and ambit of review may be guessed from the fact that the cases referred to cover a "table" of sixty-four pages, while the table of statutes covers eight pages. The work, then, is of first-class importance in the discussion of the doctrine of *ultra vires,* which the learned author examines in relation to a careful and comprehensive division of corporations and such like, including non-sovereign legislatures. Here is a wealth of well-digested and critical material, carefully arranged, and closely argued and referenced. It is unfortunate that Mr. Street and his publishers have deemed it wise to exclude American cases; but we hope that the undisclosed reasons are none other than that Mr. Street is preparing a new work on the comparative and juristic aspects of the subject. That he owes the profession such a work is evident from the volume under consideration, in which legal philosophy and realism, combined with respectful and independent criticism, meet the reader on almost every page.

To single out one aspect of such an important book is perhaps unfair; but we have found the issues raised by the problem of the liability of corporations for torts extremely interesting. Lawyers in the United States, who have not found the doctrines enunciated in the *Ashbury Railway Case* (1875) 7 H. L. 653, lie heavily upon them, will, however, not fail to appreciate their half-century and more of influence on English law. Mr. Street makes valiant, if not entirely successful efforts to get away from them; and, at any rate, he provides a balanced statement of the judicial reasoning which, we respectfully submit, he has failed to minimize. As it is, a statutory company is liable neither for its *ultra vires* contracts nor torts. The learned author suggests that the true line of development is not along the lines of the law of agency, but in making governing bodies and directors personally liable. In this he agrees with the distinguished editor of the *Law Quarterly Review* (A. L. Goodhart, *Essays in Jurisprudence and the Common Law,* Cambridge, 1931, at pp. 91 ff.). The suggestion is of extreme importance, as it avoids the issues raised by agency, in that it would eliminate discussion as to whether an *ultra vires* tort could be committed by an agent "within the course of his employment." Can an agent have capacity to commit a tort, if it is done in relation to an undertaking which the legislature did not intend to lie within the activities of the corporation? Mr. Goodhart's principle would preserve the law that the company is liable neither in its *ultra vives* contracts nor torts; but the directors ought to be held to be employers when they employ servants in work which is beyond the powers of the company, and, as employers, they would be liable for all torts committed by their servants in the course of their employment. It is, we respectfully submit, unnecessary to raise in this connection the question of corporate personality. The problem is really one of authority; and the changes suggested by Mr. Goodhart and emphasized by Mr. Street could be made by a legislature quite apart from any theory of corporations. It will be seen, then, that the learned author brings to his work problems of acute practical importance, which he analyses with fine critical power and legal and philosophical acumen.

The work is singularly free from errors, beyond a few printer's slips. The literature is fairly fully covered; but we miss several important articles from the English and American journals. Mr. Street dates his cases in his notes; but we deplore a habit (followed by Mr. Goodhart) of omitting the dates in the "table" of cases. Nothing could be more irritating and inconvenient. In addition, we miss an index of names, which would be of the greatest value in tracing opinions and Mr. Street's criticisms.

The section dealing with subordinate legislatures is too compressed to be of practical value, especially as it does not take into consideration the voluminous critical comments on the cases concerned. We doubt, too, whether the learned author appreciates fully the trends in the recent cases under the British North America Act.

W. P. M. KENNEDY.
Faculty of Law, University of Toronto.

The Mixed Courts of Egypt. By Jasper Yeates Brinton. 1930. New Haven: Yale University Press. Pp. 402.—On the 28th of June, 1875, the Khedive of Egypt established a new jurisdiction which was destined to render great service to the cause of justice. At that time France had not yet become a party signatory to the convention which had already been approved by Germany, Austria, Belgium, Denmark, Spain, the United States, Great Britain, Greece, Italy, Norway, Holland, Portugal and Russia. But the Khedive had resolved by means of an accomplished fact to overcome this hesitation on the part of the French Parliament. He was eminently successful.

The year 1875 had scarcely passed before France gave its approval to this judicial institution, of which foreigners on the soil of Egypt were to reap the benefits. France, however, imposed certain conditions and

reservations which were later extended to other signatory powers.

By an irony of fate, Nubar Pacha, the man who had conceived, and, by his constant labor and zeal, set up this splendid organization, did not assist at its inauguration. Fear had come over the Egyptian government, which found that by means of a certain clause it became itself subject to the new jurisdiction. Nubar was dismissed and was replaced by Cherif.

On the 26th of February, 1876, the definite establishment of the jurisdiction of the Mixed Courts of Egypt took place, and a marble tablet in the Palace of Justice at Alexandria commemorates the celebration of the 26th of February, 1926, as the 50th anniversary of this event.

We are indebted to Jasper Yeates Brinton, a member of the Court of Appeals at Alexandria, for having admirably collected and expounded, in a treatise of three hundred and fifty pages, all the information of interest concerning the courts: the origin and background of the conception of mixed courts (the author cites no less an authority than a letter from the Roman Emperor Claudius to his people at Alexandria); the difficulties and the diplomatic struggles which lasted more than ten years, in which the champion of the idea, Nubar Pacha, triumphed over all his adversaries; the organization of international jurisdiction, the laws applicable to it, and the procedure, both civil and criminal; the administration, the budget, and the composition of these tribunals; the rules of court; and projects for reform.

In addition the author has devoted an entire chapter to the delicate question, which proved fatal to Nubar Pacha, of the authority of the Mixed Courts even as against the government.

It is difficult to give an adequate summary of this work, so filled with facts and ideas. It would not be possible or profitable here to do more than to sum up the specific information which it contains concerning the organization of the courts and the extent of their jurisdiction.

The Court of Appeal sits at Alexandria and is composed of a Norwegian President, an English Vice President, and fifteen members, of whom six are Egyptians, two are English, one American, one French, one Italian, one Belgian, one Greek, one Swiss, and one Spanish.

The three district tribunals sit respectively at Alexandria, Cairo and Mansura. The President of the court at Alexandria is Norwegian; of the court at Cairo, Swiss; of the court at Mansura, Italian. The Vice Presidents of these courts are respectively Portugese, Russian and Swedish.

Although Cairo is the capital, Alexandria was selected in preference to it as the seat of the Court of Appeal with a view to withdrawing the court as far as possible from the danger of political and diplomatic influences. Repeated efforts have been attempted to transfer this court to Cairo but these have not as yet come to a head.

The unique bar, which was organized and patterned after principles which are well established in France, makes rules for the admission of its members, with the right of appeal from its decisions to a commission of five members, consisting of the President, a Councillor of the Court of Appeal, the Bâtonnier (Head of the Bar), and a member of the Bar, and the Procuror General. The Bar consists at present of 506 enrolled barristers and 239 probationers. The majority are Egyptians, Greeks, Italians and French. Women have been represented there since 1906, but to this day there are not more than two of them enrolled as barristers and four as probationers.

What is the scope of the jurisdiction of the Mixed Courts?

Every proceeding which involves a party who is not an Egyptian (with the sole condition that the two parties to the litigation must not be of the same nationality), is within the jurisdiction of the Mixed Courts. If it is borne in mind that there are in Egypt 150,000 foreigners and that these control the entire commercial life of 40,000,000 inhabitants, it may readily be seen how few controversies of any importance fall outside of the jurisdiction of these courts, especially as no law respecting foreigners can be enacted without the approval of the Mixed Courts.

The annual budget of this institution is five million dollars.

During the fifty-five years that the Mixed Courts have functioned they have thoroughly justified their existence. It may be said that nowhere in the world does a foreigner enjoy more certain guarantees that his rights will be respected.

Thanks are due to Judge Brinton for having made all of this known.

Paris, France. FERNAND IZOUARD.

(Translated from the French by Richard Bentley.)

Efficiency and Scarcity Profits, by C. J. Foreman. 1930. Chicago: University of Chicago Press.—This treatise is a product of the excellent work that has been started at the University of Wisconsin, first by the author's teacher, Professor R. T. Ely, and now being continued there by Professor John R. Commons, and at Johns Hopkins by Professors Marshall, Cook, Oliphant and Yntema, in bringing law and economics together.

There is little question about the fact that industrial activity in our modern economic system is controlled and in many instances even determined by the *law*. Accordingly, an understanding of our present-day profit-system cannot be gained without a full knowledge of how the legal system influences economic activity.

Dr. Foreman, an economist, attempts to aid us in accomplishing this task by presenting an interpretation of how the courts have affected the motivating force in our economic system—*profits*. The major theme of the book rests on the basis that profits are divisable into "earned" and "unearned" elements. In the past, the English and American courts have in the main recognized the first but not the second element. In recent years, the leniency of the courts towards combinations and the tendency on their part to allow restrictions on competition have resulted in the presence and justification of undue "unearned" profits. Consequently, our courts are tending to legalize the "plunder" of our large corporations. The way out, according to Dr. Foreman, is to raise the "plane of competition" and once again legally recognize *only* "earned" profits.

A complete discussion on profits should have an answer at least to the following questions: Why do profits exist? Who is likely to be the recipient of profits? Are profits price-determined or price-deter-

mining? What are the significant factors that affect the extent and variations of profits?

Dr. Foreman finds two primary sources of profits. The portion of profits he calls "earned" or "efficiency" profits, arises out of the presence of risks and innovation. The other portion of profits he calls "unearned" or "market-surplus" profits. This income-share arises out of the presence of "imperfect competition." Of all the forces making for "imperfect competition," the law is exceptionally important by sanctioning contracts which "have proved a constant menace to the freedom of trade and commerce" and by measuring "damages" on the basis of "unearned increments" arising out of the use of these contracts. It follows in all probability that the courts are in a position to reduce these "unearned gains" by changing the existing legal practices and by checking the current legal tendencies.

Dr. Foreman implies that the "entrepreneur" gets the profits, but nowhere does he clearly indicate who is the entrepreneur. He seems to imply that the entrepreneur is some person or small group of persons who is "dominating" business units.

In regard to the question as to whether profits are price-determining or price-determined, Dr. Foreman takes a middle ground. The "efficiency" or "earned" profits are price-determining. They are part of "costs" and should be sanctioned by the law. The "market-surplus" or "unearned" profits are price-determined. They are not part of "costs" and should be either eliminated or drastically reduced by the courts.

In his treatise, Dr. Foreman neither presents any data on the level, extent, and variation of profits nor does he discuss the matter in terms of demand schedules and supply schedules. He does present a non-quantitative discussion of the forces which *directly* make for "market-surplus" or "unearned" profits and for "efficiency" or "earned" profits. The level, extent, and variations of these "unearned" profits are determined by the "plane of competition," which in turn is primarily a function of the conditions the law has sanctioned and in many respects sponsored. The "earned" profits, the income-share that should be protected by the law, are determined by the forces influencing the supply of and demand for ability (a) to improve methods of carrying on business activity, (b) to reduce and avoid risks.

The book as a whole is an interesting and stimulating attempt to deal with a very difficult but exceedingly important subject, a subject which involves the consideration of the very roots of our industrial system and of the fundamental functions of our legal system. Economists and lawyers should welcome this study and should stimulate the work of all those who are trying to tie in more closely *law* and *economics*.

S. H. NERLOVE.

University of Chicago.

The Trial of William Henry Podmore, by H. Fletcher-Moulton and W. Lloyd Woodland. 1931. London: Geoffrey Bles. Pp. 286.—This is the most recent and by no means the least interesting of this publisher's Famous Trials Series.

The crime resulting in the conviction and execution of William Henry Podmore for the murder of Vivian Messiter at Southampton, England, is remarkable from the facts that the murder was not discovered for more than ten weeks and the accused was not tried for more than a year from this discovery. Upon the Attorney General refusing to grant a certificate to permit an appeal to the House of Lords from the decision of the Court of Criminal Appeal refusing to quash the conviction, there followed a widespread agitation for the intervention of the Home Secretary—not wholly without apparent justification, be it said, as the evidence was wholly circumstantial except that of fellow-prisoners who without real corroboration swore to admissions by the prisoner, all of which were denied by him. The Home Secretary stood firm: "I am not prepared to make a mock of the law— . . . to ignore the solemn decisions of Courts, Judges and Jury . . . It is the right of the public to change the law: it is the duty of the Minister to apply the law."

The accused, who had a bad record, was convicted on sufficient if not wholly convincing evidence of the murder in his place of business of an oil salesman on October 30th, 1928, the body not being discovered until January 10th, 1929—Podmore being arrested on the charge of murder December 17th, 1929, tried March 3rd-8th, 1930, and executed April 22nd, 1930, protesting his innocence to the last. He had suffered two terms of imprisonment in 1929. It is probable that his bad criminal record had something to do with the verdict of the jury and his statements in and out of the witness box certainly assisted the prosecution—it would perhaps not be too much to say that, like the murderer Rouse, he would probably have been acquitted had he not given evidence.

Some of the statements in his work will be news to the reader on this side of the Atlantic; e. g., counsel for the prisoner was given the privilege of addressing the jury last, though his client had gone into the witness-box, and the editors justify the omission to call his paramour by the "very important consideration that, by calling her, the defence would have lost the advantage attaching to the last word." With us, counsel for the prosecution can always claim to address the jury last. Moreover, few criminologists will agree with the editors "that it is time to protest when we find the Crown [i. e., the prosecution] putting forward a witness with the record of" the fellow-prisoners, and the perusal of their evidence "produces a feeling of regret, almost of shame." Every experienced prosecuting counsel has found such evidence very useful in bringing home to an astute criminal, his guilt. Of course, the trial Judge should and always does warn the jury to weigh such evidence with great suspicion and care; but counsel would be derelict in his duty, if, knowing of such evidence, he should not bring it before the jury.

As in all the other members of this series, paper, print, binding, proof-reading are all impeccable.

WILLIAM RENWICK RIDDELL.

Osgoode Hall, Toronto.

The Economic and Social History of an English Village (Crawley, Hampshire) A. D. 909-1928, by Norman Scott Brien Gras and Ethel Culbert Gras. Harvard Economic Studies, vol. xxxiv. 1930. Cambridge: Harvard University Press. Pp. 730, XV.—It is probable that no study so detailed and so well documented as this has yet appeared of any English village. The authors have ransacked the voluminous archives of the Bishopric of Winchester, now preserved at the Public Record Office, London, covering the history of the estate from the tenth century, when the son of Al-

fred the Great granted it to the Bishop of Winchester, down to 1869, when the Ecclesiastical Commissioners took over the episcopal lands and became lords of the manor of Crawley. The magnificent series of reeves' accounts, leases, fines, surrenders, wills, inventories and court rolls have been supplemented by aerial photographs, Anglo-Saxon charters, parish registers, churchwardens' accounts, the enclosure act of 1795, and census statistics, ending with some interesting sociological and agricultural surveys of the village today, compiled by three well qualified residents. The book falls into two sections; pages 1-163 sketch the evolution of the village from the fifth to the twentieth century; the remainder contain documents, with annotations and comments, and analytical and statistical tables of prices, wages, income, expenditure and yield of the fields and flocks. The book is well illustrated with photographs. From the wealth of facts thus set forth, no clear-cut theories emerge, and few startlingly new results, but the solid value of the work for economic historians can hardly be exaggerated.

It is on the sociological side of the survey that the questions of legal interest arise. The lay-out of the open fields, together with the existence of two types of holdings and service, convince the authors that medieval Crawley had a dual origin, an unfree Celtic village having become joined to a free Saxon village before the process of manorialization set in. A suggestive computation of the villagers' income and expenditure in the thirteenth century leads to the conclusion that "the Virgater of South Crawley (holding 16 acres) was pretty well off, while the farthing-lander of North Crawley (holding 5½ acres) was on a subsistence basis."

The next point of interest concerns the commutation of praedial services. Any idea that the manorial system was abandoned in England in the fifteenth century receives a rude shock from Crawley conditions; whether rural or ecclesiastical conservatism be the cause, field services were exacted from the tenants here up to the end of the eighteenth century. The authors show that the process of commutation of week-work began in the thirteenth century and was practically complete by 1409, when the leasing of the home farm began, but that the other, seasonal works of ploughing, carting, harvesting and sheep-shearing were still exacted long after this. The service of carting the lord's manure was only commuted in 1690, the service of washing and shearing the lord's sheep only in 1795. In the same way the customary payment of 125 fowls as church scot was made from at least 1256 to 1795. Inheritance by the youngest son—borough English—lasted, for the copyhold tenants, down to 1924.

The authors find the peak of manorialism in Crawley, as far as the quantitative exploitation of the demesne goes, at the beginning of the thirteenth century; as concerns productivity and net profits, about 1300. By that date the process of personal emancipation was well on foot, signalised by payments for the privilege of living away from the manor, though 'bondmen' are still mentioned by that name under Charles I. Only in one instance is manumission specifically mentioned; free status would seem to have come by default rather than by explicit grant. In the earlier medieval period the authors think it possible that there was only one freeman on the manor besides the rector (p. 231). This seems hardly compatible with the holding of a tourn, of which there is evidence at least from 1355 (p. 272), as presentments in the tourn or leet had to be made by a jury of 12 freemen.

The account of these courts (pp. 106-11), as of the general legal and administrative position of the manor in the national system (p. 61), leaves something to be desired. As no roll of the manor court earlier than 1599 is printed, it is to be presumed that no medieval court roll is extant, but it is not safe to argue from 16th century court procedure and practice to those of the 13th century. The evidence of the entries headed *perquisites of the court* in the annual reeve's account is necessarily incomplete. From the distinction drawn by the authors between what they call 'the private hundred' (better, private tourn) of Crawley, and 'the public hundred' of Budlesgate, in which Crawley lies, the reader could hardly guess that Budlesgate was a private hundred, held by the lord of Crawley—the Bishop of Winchester—from "time immemorial." The charter of 909 (pp. 171-4) by which the bishop was granted the lordship over the hundred hides lying within a seven-mile radius of Winchester, with the outlying regions of Nursling and Chilbolton, was almost certainly the title by which the bishops held the later hundred of Budlesgate and Fawley, receiving within those districts the dues which the kings had received before the grant was made. This, surely, is the answer to the question posed on p. 71, "What did the King mean to bestow on the bishop?" No new lordship was created; the king could not grant what he did not in fact possess, but he could grant a superiority which gave to the bishop those judicial and tributary rights that had hitherto been the king's, and he could lighten the burden of the geld by beneficial hidation. Here we venture to differ both from the authors and from Maitland[1] in reading the Chilcomb charter to mean that the limitation of the assessment to one hide applied only to the manor of Chilcomb itself—the demesne land "ploughed for the bishop," which was very lightly taxed at that rate, and not to the whole area, with its nine dependent estates that "lie into Chilcomb," whose assessment adds up to 99 hides.

The relation between the manorial and the hundredal rights and duties of the bishops, whether in the tenth or in the thirteenth century, is a complex problem, now being studied, as the authors note (p. 122, note 2), by other scholars. As the purpose of the work is mainly economic, a detailed study of administration ought not to be expected here, but in drawing a full length portrait of the village it is important to remember it has other than manorial features. The bishop is not only lord of the manor and of the hundred, but also the king's representative for national purposes. The presentments made in his private tourn are made *pro domina regina* (p. 509), and will be reported to the royal officials, whether sheriff, coroner, or J. P., for future action, if necessary. Crawley is part of the national system of police and militia, with its elected constable for keeping the king's peace and enforcing his assize of arms; it renders its quota of national military service at need regardless alike of feudal obligations or of "the rising spirit of freedom" (p. 550). These matters may not have left their trace on the manorial records, but just as in civil matters the freeman will transact his freehold concerns in the king's court (pp. 464-6), so in matters of the king's peace the Crawley villager is certain to have left his traces

1. *Domesday Book and Beyond*, pp. 449, 496.

on the rolls of the king's justices. Crawley was no more isolated legally and judicially than economically.

A few minor points may be noted. The hundred court of Budlesgate was held on a Saturday, not a Sunday, in 1465, not 1466 (p. 505); the Anglo-Saxon *necessitas* was *trimoda*, not *trinoda* (p. 53); *to Crawelea* means *at*, not *to* Crawley (p. 180). A rather melancholy postscript to the narrative of recent agricultural enterprise on the part of the chief landowner is supplied by the notice which appeared in the London *Times* for 21st of April, 1931, appended to a beautiful photograph of the village: "The greater part of this village is to be sold by auction early next month."

HELEN M. CAM.

Girton College, Cambridge, England.

League of Nations: Ten Years of World Cooperation, by the Secretariat of the League of Nations. 1930. Geneva. XI, 467 pp. (American distributor, World Peace Foundation, Boston.)—This is an objective account of the work of the League in the first ten years of its existence. Of its fourteen chapters two deal with the more specifically political functions of the League, the settlement of disputes, the organisation of peace, and disarmament; two with the Permanent Court of International Justice and the codification of international law; five with governmental cooperation through the League on economic and financial questions, on communications and transit, on health, on intellectual relations, and on social and humanitarian questions, respectively; three with the special tasks of the League in connection with mandates, minorities, the Saar Territory, and the Free City of Danzig; one is devoted to the finance of the League itself; and a final chapter shows the League's dependence on public opinion and how its methods have been determined by that basic fact. An Appendix contains annotated bibliographies of publications of the League and of the principal works about the League.

The official character of the book made it necessary to confine it to a record of facts, and the authors' comments aim at explanation and not at the expression of judgments on the League's work. But the facts themselves are eloquent, showing clearly that the League, as the introduction claims, has gained a central place in international life and politics, and that there is hardly a feature of international life, still less of inter-governmental cooperation, that does not fall within its province.

A full review of this book would be a review of the League itself. Those who are already generally familiar with the League's work will find here the bare facts of any incident in which they may be interested, conveniently stated, and indications of the materials for more detailed study. On others the first impression will probably be of the immense complexity and diversity of the organization, and (it may be hoped) of the folly of any uninformed judgment of its value. Those who doubt its value might be asked to consider, by way of illustration, three passages dealing with the League's work in very dissimilar fields: the account of the dangerous Greco-Bulgarian incident in 1925, and the contrast between the technique successfully applied through the League on that occasion with that which was available to the statesmen who tried to deal with another Balkan incident in July, 1914; the astonishing success of the scheme of reconstruction applied in Austria in 1922; and the handling of the appalling problem of refugees in the years following the War.

J. L. BRIERLY.

Oxford, England.

Theory of Legislation. By E. Jordan. 1930. Indianapolis: Progress Publishing Co. Pp. xx, 482.—Philosophers have ever been interested in the problems of law and the state, as one of the most important forms of human relations, which it is their province to think through. Their ideas are too often expressed in concepts which are new to the layman and especially to the lawyer, and which make very difficult the task of reading their contributions to juristic thought. The book under review is no exception to this rule and the lawyer who sits down to its 480 pages will find that, like drafting a statute, it is no "pastime for a summer's day." For Professor Jordan, legislation is the way in which the corporate will is made effective, and the problem of legislation thus stated has "little to do directly with the 'passing of laws' or the formulation of statutes." "Legislation is, for the theory of practice, the process of constituting the cultural public body as a system of realized values: and it is a continuous and eternal act and an adventure in pure speculative theory because the public body manifests cultural life or grows" (p. XI.) The three phases of the legislative process are: first, what is normally called legislation, "the process of law formulation as carried on through discussion in parliaments and resulting in statutory enactment." The second is administration, and the final stage is the "judicial or reflective process" (p. 104.) The general function of the first phase is deliberative formulation of policy and its method is "quite properly that of formal logic as expressed in discussion and argumentation." The author insists on the point that laws should be general, citing Plato and Aristotle (p. 132,) and that the legislature is not the body to fix details. This is a function of the administration, which tries out the rule in practice. The court finally, as the deliberative department, fits to life the rule as it has been applied.

The author criticises sharply the representative system which he says is "a contradiction in terms" (p. 22.) He thinks its day is passed and that progress in society is preparing a new system, though the reviewer is not clear as to what the substitute will be. The reviewer believes that the author has failed to notice that the legislative body is not a maker of the rule so much as a sort of court before whom the different interests appear, each arguing its own point of view, and thus, perhaps, applying in practice his own theory that law comes out of "the institutionalized relations of experiences." All law, he thinks, is in this sense "common law" and "makes itself" (p. 37.) Some human body, however, must find and declare that law, and this the modern legislature (the reviewer thinks) is by and large trying to do, not by making a compromise between interests, which the author condemns, but, with the aid of argument by conflicting interests, discovering the rule consonant with the public good.

The author analyses philosophically administration, and at some length. An interesting theory is that an administrative agency well fitted to its purpose may itself result in a well organized system through the opportunity it offers individuals for fulfilment of their creative tendencies (p. 381.) He cites the postal sys-

tem and the judges of the federal court. The responsibility for the failure of many administrative agencies he would lay to the legislature which had not sincerely tried to adapt them to their functions. Everyone will admit that he is right in saying that "the reason so many public agencies will not work is that the intention they should work was never pure" (p. 384.)

In a few instances the author gives an inkling as to his own theories of social reform. He believes that the principle of private property no longer has a place in our social organization and that the most important policy to be formulated has to do with this situation. Property, he thinks, "has no genuine legal or constitutional status as the private exclusive appurtenance of the isolated person (p. 443.) A utility company, for example, and the owner of a factory are merely agents of society, and the relationship of users of the utility to the company and workmen to the owner should be treated on a basis in which the "superstition of ownership" should not play a part. As a consequence, he affirms that "no real questions of law can arise in treating property as individually owned" (p. 443.) A lawyer will have to adjust violently his terminology to accept this dictum. The reviewer believes also that the statement that private interests "invariably thrive at the expense of the public welfare" depends on the conception which the author holds of private property in the social order. With a different conception quite a different opinion might be maintained.

JOSEPH P. CHAMBERLAIN.

Columbia University.

Law Office Management. Report of Special Committee on Law Office Management of the Association of the Bar of the City of New York. 1931. New York: Baker, Voorhis & Co.—The Association of the Bar of the City of New York always does well what it undertakes to do, and over a long and colorful existence it has undertaken some very sizeable jobs. *Law Office Management,* a volume containing the report of the Special Committee of that Association on Law Office Management, is no exception to the rule. It is a good piece of work. It is no more and no less than it purports to be—a committee's report with special reference to law office conditions obtaining in New York City. It makes no pretense of being a textbook, like, for instance, Dwight G. McCarthy's *Law Office Management.* No discussion of psychological questions is to be found in its pages. It is plain, matter-of-fact and to the point. A student of law office management can find much of interest in it. The practicing lawyer is supplied with a large fund of valuable information from which he can pick and choose and reshape or adopt *in toto* as may best suit his individual requirements.

To set a standard of procedure for all offices, or for even many offices, is quite impossible. Each has its own peculiarities and its individuality, to meet which forms, procedure and practices must be shaped. From this it follows that there is little likelihood that any office would adopt all of the suggestions contained in this volume. Its authors probably never intended it would be accepted in its entirety.

However, every lawyer would be well advised to read this book. No one will find himself able to say that there is nothing in it for him or that the entire ground has been covered by others.

The suggestions relating to the cost of performing services are especially valuable. Cost is an element that too often is overlooked by lawyers. No business institution would be expected to last for any length of time without a careful study and analysis of the cost of its product. Every business man knows that cost is fundamental. However, it is safe to say that not one lawyer in a thousand knows what it costs his organization to perform a given service. Without this knowledge, he is groping in the dark in making up the charges to his clients but with it he is on safe ground, both in making his bills and in discussing the matter with his clients, if discussion becomes necessary.

The Special Committee of the Bar of the City of New York has made a real contribution to the legal profession and to the literature relating to law office management.

ROGER SHERMAN.

Chicago.

Leading Articles from Current Legal Periodicals

CORNELL LAW QUARTERLY, June (Ithaca, N. Y.) — The American Law Institute's Restatement of the Law of Contracts with Annotations to the New York Decisions, by Horace E. Whiteside.

AIR LAW REVIEW, July (New York City)—Rules of Aircraft Liability in the Proposed Federal Merchant Airship Act, by John C. Cooper, Jr.; Origin and Development of Radio Law, by William J. Donovan.

THE LAWYER AND BANKER AND CENTRAL LAW JOURNAL, July-August (New Orleans, La.)—The Nullifiers of the Immutable Law, by Benjamin S. Dean; The XVIII Amendment, by George F. Ort; Land Descriptions, by W. Caven Taylor; Photography and Forgeries, by L. Webster Melcher; A Federal vs. State Power; The Validity of a State Tax upon the Coming into Possession and Enjoyment of a Vested Remainder, by Robert C. Brown; Conflict in Laws Relating to Beneficiaries, by John V. Sees; Personal Sketches—Hon. Ira W. Jayne.

LAW NOTES, August (Northport, N. Y.)—Procuring Genuine Signature by Fraud as Forgery, by Carl V. Venters; Privilege as to Facts Learned on Autopsy, by G. M. Hood; Baseball and the Law, by Joseph T. Buxton, Jr.

PHILIPPINE LAW JOURNAL, July (Manila)—The Hereditary Rights of the Surviving Spouse under the Civil Code, by Rosauro L. Alvarez.

CALIFORNIA LAW REVIEW, July (Berkeley, Cal.)—Questions of Policy in Drafting a Modern Corporation Law, by Henry Winthrop Ballantine; The Rise of Summary Jurisdiction in English Criminal Law Administration, by Pendleton Howard; The Legal Status of Indian Suffrage in the United States, by N. D. Houghton; The Full Remarks on Advocacy of Lord Brougham and Lord Chief Justice Cockburn, by George P. Costigan, Jr.

UNITED STATES LAW REVIEW, August (New York City)—"Popularizing" the Law and "Legalizing" the News, by U. S. Circuit Judge Martin T. Manton.

IOWA LAW REVIEW, June (Iowa City, Ia.)—The Development of Law in the Philippines, by Eugene A. Gilmore; Pleading Negligence in Iowa, by Forest L. Bedell; Sovereignty and the Federal Amending Power, II, by Lester B. Orfield.

TULANE LAW REVIEW, June (New Orleans, La.)—The American Systems on the Conflict of Laws and Their Reconciliation, by Antonio S. de Bustamante; The Integral Unification of American Civil Law, by Francesco Cosentini; Elements of Peruvian Commercial Law, by Roger D. Moore.

IDAHO LAW JOURNAL, May (Moscow, Ida.)—The Idaho Judicial Council, by Dana E. Brinck; The Law of Community Property in Idaho II, by Francis W. Jacob.

UNITED STATES LAW REVIEW, June (New York City)—Aircraft Clauses in Accident Policies, by William O. Reeder; A Proposed Constitutional Amendment Regarding Impeachment Proceedings, by Senator Hiram Bingham.

Washington Letter

1266 National Press Bldg.
Washington, D. C.
September 8, 1931.

Federal Radio Commission

THE Legal Division of the Federal Radio Commission has made an analysis of the 180 reports submitted to the Commission by its Examiners, after formal hearings, on applications filed with the Commission, to determine the fundamental reasons given by the Examiners as a basis for their decisions.

In approximately 60 of the 180 cases, the Examiners recommended denial of applications on the ground that satisfactory service is now being received by the area, and the granting of the application would not improve service. Under this same head might also be placed the conclusion that by granting a new facility to a particular community it would create an inequality of radio facilities in that particular portion of the State.

In 40 cases denials were based on this ruling: "The applicant must make a satisfactory financial showing in order to prevail in his application and must satisfactorily show that he is able to maintain and operate the station in the future."

The opinion that objectionable interference would result from the granting of the application was the basis for denial recommendations in 58 cases. In 62 cases the Examiners held that the State and zone from which the applications originated now have their equitable share of radio facilities and that the applications therefore should be denied.

The equipment proposed to be used by new stations or by stations seeking improved facilities must be satisfactory and modern in every respect and comply with the license requested, the Examiners held in 25 cases. Under this head might properly come the conclusion that inadequate power and uneconomical distribution of facilities will cause a denial of the application.

In only a dozen of the 180 cases reviewed did the Commission find that the applicant stations had violated the rules, regulations and general orders of the Commission. Under this head might properly come the conclusion that the character and type of programs being broadcast is not in the public interest.

The Davis equalization amendment and general orders of the Commission relating to that amendment, and the principle of an equitable distribution of radio facilities among the States and zones, enter into the findings.

This means, in effect, that in order to take facilities away from another station there must be a showing by the applicant of its ability to serve public interest and a further showing that the facilities of the other station should be forfeited. The burden is upon the applicant to show a superior service and a necessity for the same by a preponderance of the evidence. There were eight cases affirming the Examiners on findings on this point.

Granting of a request for additional time in which to construct stations or improve facilities will be permitted only when the causes are due to no failure on the part of the applicant to comply with the original construction permit, the Commission has held in two cases, supporting Examiners.

Another conclusion is that if an application is in violation of the Commission's reallocation order of 1928 (Gen. Order 40) in which the assignments of more than 90 per cent of the stations then on the air were shifted, it will be denied. The Commission sustained the Examiners in nine such findings. This order establishes the various categories of stations, by channels and power, and any application inconsistent with these classes automatically is held to be improper.

General Order No. 119

On September 3, 1931, the Radio Commission promulgated General Order No. 119 to replace General Order No. 88 covering the allocation of facilities and services. Copy of the order may be obtained from the Commission. The realignment follows the recommendations made by the conference of the International Technical Consulting Committee on Radio Communications, which met at The Hague in the fall of 1929.

The broadcast band, which ranges from 550 to 1,500 kilocycles, is unaffected by the new channeling system, but by a complete revision of the allocations of wave lengths for commercial and experimental communications stations, consistent with the development of radio technique, and entailing a reduction in Channel widths, the order will virtually double the number of available frequencies. It puts into effect a one-tenth per cent separation between frequencies above 1,500 kilocycles. The Channel of 1,550 kilocycles is established as the "visual broadcasting sound track."

Postal Savings

Postal Savings deposits at the end of the fiscal year 1930 totaled $175,271,686, an increase of $21,627,157 over the amount for the previous year. Figures for 1931 have not yet been completely compiled, but it is estimated that the total is between $350,000,000 and $400,000,000, an increase of approximately $200,000,000.

This increase is probably due to two factors—first, failure of many banks has decreased public confidence, especially in the small commercial banks; second, there is a general tendency to save during the depression.

The Post Office Department, upon receipt of Postal Savings deposits, redeposits them, in many instances, in the same, or similar banks from which the money was withdrawn or which were avoided as not trustworthy. There has been an abundant demand for the service and the demand is increasingly insistent.

The Postal Savings is a logical refuge for the timid. It has salvaged millions from stove-pipes, hollow trees, mother earth and hundreds of other places and is admittedly one of the best feeders of banking institutions.

Mexican Claims Commission

The Special Claims Commission and the General Claims Commission, for the consideration of claims against the United Mexican States growing

out of the Mexican Revolution, and other claims, expired by treaty limitation on August 17th and 30th respectively. It is generally understood that negotiations are under way between the Department of State on behalf of the United States and the Mexican Government, looking to new treaties or conventions for the continuance of the work of the two Commissions. The United States Senate, by resolution passed prior to the expiration of the convention, authorized their renewal.

The total amount involved in all the claims filed before the two Commissions ran up to approximately $675,000. There have been 137 decisions by the General Claims Commission with awards totaling approximately $2,599,166, to which is added interest on the claims approximating $755,778. There are 103 claims on the calendar of the General Claims Commission, which have been briefed and submitted, involving approximately $39,300,653. Various other claims are pending in different stages of preparation.

In the Special Claims Commission there have been decisions in two groups of cases: (1) the Santa Isabel cases, involving 17 cases of American citizens murdered by the Villistas in 1917, decided adversely to the United States, and (2) a case involving death in the Pascual Orozco, or Russel case, decided adversely to the United States. One hundred and fifty-one other cases, involving claims amounting to $6,983,875 have been briefed and submitted to the Special Claims Commission.

National Commission on Law Observance and Enforcement

Report No. 10 of the Wickersham Commission entitled "Report on Crimes and the Foreign Born" may be obtained from the Superintendent of Documents, Washington, D. C., for 75 cents per copy. The report sets forth in the conclusions reached, that in proportion to their respective numbers the foreign born commit considerably fewer crimes than the native born; that the foreign born approach the record of the native born most closely in the crimes involving personal violence, and that in crimes for gain the native born greatly exceed the foreign born. The Commission is inclined to the belief that the future immigration policy of the United States can safely be determined on general economic and social grounds and that the difficulty of the problem of maintaining the social order, by inculcating a spirit of law observance and establishing an efficient system of law enforcement for those who will not observe, certainly has not been increased disproportionately by the conduct of the foreign born.

The Causes of Crime

Report No. 13 is entitled "Report on the causes of Crime" and is in two volumes. Volume one, which may be obtained from the Superintendent of Documents for 80 cents, sets forth the report of the Commission and the separate report of Mr. Henry W. Anderson, who was unable to concur in the report made by the Commission. With the report of the Commission and the separate report of Commissioner Anderson, are printed three reports to the Commission by its consultants discussing the subjects of "Some Causative Factors in Criminality," and "Work and Law Observance." Volume two is entitled "Social Factors in Juvenile Delinquency." The cost of volume two is 85 cents.

The Cost of Crime

Report No. 12 of the Commission is entitled "Report on the Cost of Crime." It may be obtained from the Superintendent of Documents for $1.10. The report states that the tremendous economic burden imposed by crime upon the community is clearly demonstrated by the investigations which have been made. Regarding the cost of administration of criminal justice, the report of the investigators estimates that the administration of criminal law costs the Federal Government something over $52,000,000 annually, while other expenditures in the machinery of criminal justice would bring the total for this item to approximately $350,000,000.

"One of the most important conclusions reached, and one with which we thoroughly agree, is that the cost of administering the criminal law, while large, is of less economic importance than the losses inflicted by the criminal, so that it is much more important from an economic standpoint to increase the efficiency of the administration of criminal justice than to decrease its cost. True economy in administering the criminal law may well require in many instances the material increase of expenditures for enforcing the law in order to secure increased efficiency and in order to deal adequately with new types of crime and 'improved' methods of criminals."

Annexed to the Commission's report is a Report on the cost of crime and criminal justice in the United States prepared under the direction of Goldwaite H. Dorr and Sidney P. Simpson. Their summary of recommendations is as follows:

(a) that appropriate steps be taken to develop accurate and annual comprehensive statistics as to the cost of administration of criminal justice by the Federal Government and by the several States and their municipal subdivisions;

(b) that the comparative study of municipal costs of criminal justice undertaken and partially completed by us be finished;

(c) that a scientific study of commercialized fraud in all its aspects be made;

(d) that a similar study be made of racketeering and organized extortion; and

(e) that measures be taken to reduce, so far as practicable, the economic burden now imposed on jurors and witnesses in criminal cases.

Decision Sustaining State Bar Act

THE decision of the Oklahoma Supreme Court sustaining the constitutionality of the State Bar Act, which was handed down on April 21, is printed in full in the May issue of the State Bar Journal of that state. The case was entitled the State Bar of Oklahoma vs. I. P. McKee and Frank R. Burns, and it came before the Supreme Court on appeal from a writ of prohibition issued by the District Judge of Ottawa county, forbidding the Board of Governors to conduct a hearing as to the fitness of the two attorneys. The opinion was by Mr. Justice Kornegay.

NEW YORK'S LAND TITLE REGISTRATION LAW

Last Legislature's Amendment of Real Property Law in Relation to Registration of Titles to Land Perfects System of Establishing Titles Judicially Where Owners Decide to Avail Themselves of Statute — History of Legislation, etc.

By J. Tyson McGill

Official Examiner of Titles for Kings County

WITH the approval by Governor Roosevelt on April 20, 1931, of the Messer-Nunan bill amending the real property law of the state in relation to registration of titles to land, it may be fairly stated now that the state has perfected an ideal system of establishing judicially all titles to land within the state where the owners thereof decide to take advantage of the statute. To justify this statement a brief review of the history of this legislation may be in order.

A commission was appointed by Governor Hughes in 1907, as authorized by the Legislature of that year, to investigate the subject of land title registration, or the so-called "Torrens System" as it became known, at any place in the world where it had been adopted and was in use. Its report favoring the enactment into law of the system for New York was accepted and approved by the 1908 Legislature. The investigation as appears from the report of the commission had been rather thorough, but the report was approved by a bare majority of the members since three of them submitted a minority view that to this writer appeared more biased and antagonistic than honest effort. The new law went into effect for all counties of the state on February 1, 1909 and none but the metropolitan counties made previous preparation for its workings. It was what might be termed a special law at first, but in the year that it took effect the commissioners that had been appointed to prepare the state's Consolidated Laws, being the statutes of a general nature, completed their work and recommended that the Land Title Registration Law be merged in the Real Property Law where it properly belonged. The Legislature adopted that recommendation and this particular subject matter was incorporated as Article XII of the real property law where it is still identified.

The American Bar Association and the Commissioners on Uniform State Laws had taken up consideration of the subject of legally establishing titles to lands, and their work through the study and reports of committees had taken a number of years before their conclusions reached final form to be submitted to the several states for enactment. Unfortunately the New York enactment at the start varied far and wide from the "Model Act" proposed by these learned and experienced lawyers. Our first statute was clearly a compromise and had many defects that glared forth as attempts were made to use the law. It offered in the beginning nothing but a lawsuit to determine claims to given parcels of land. While certain attorneys and title insurance companies might qualify as official examiners of title to do the work under the statute and report conditions to the court, there was no provision made for any real independent and indifferent officials to supervise the work of registration. These official examiners were dependent upon those owners of land who hired them for compensation for the work they did, and being attorneys, they not only acted as official examiners but in many instances were the attorneys of record for the owners and thus had a very material interest personally and privately in their own work officially. Such a fatal condition of operation in the beginning resulted in much litigation and to the courts was left the business of looking after the interests of the state or its counties in the matter of guaranteeing titles. The original law provided for fees to be paid into an Assurance Fund, created to meet losses and damages sustained through registrations in error, and then a strange provision was inserted leaving the payment of such fees optional with the registrants. While that situation continued, it is a matter of record that no fees were paid into the fund. Had there been any losses, there was nothing to compensate them. The reporters of the various courts of the state began to show decisions involving the attempted uses and the constructions placed upon this statute. Over-zealous owners, realtors and attorneys had hailed the new system as a cure-all for defective titles to land; and the courts were repeatedly called upon in the last resort to emphatically state and lay down as the law that the registration system was ordained to judicially establish good titles and not to validate bad ones.

After the first spurt in attempting to register titles the practice died down until 1916 when the first set of numerous amendments to the law were made, and these were so stultifying that the law became dormant until after the next revision in 1918.

Material and important changes were then enacted. All formerly licensed official examiners of title were legislated out of office, and in their stead were established official examiners of title, for each county that cared to appoint them, who were officials of the county and their compensations paid directly by the county. They were in no wise dependent upon the registration proceedings they handled, and could not function in any proceeding in which they might have an interest. Their tenure was unlimited and they were supervised by the courts and responsible to them. Their appointment was made by the Registrar of the county after com-

pliance with the rules of the Court of Appeals specially established, and after rigid examination as to qualifications by the state board of law examiners that regarded experience as a great factor in fitness. The operation of the law was changed from a mere law suit that was simply an action in personam to a special proceeding in rem, dealing more with the title to the land itself rather than with many and numerous individuals that might make up its ownership. Payment into the Assurance Fund of definite fees upon the first registration was now made compulsory in order to set up a fund to cover losses resulting from errors or omissions of the various officials charged with the administration of the statute.

Under this revision, official examiners were appointed in the counties within the city of New York and in some instances in the other counties of the state; and the work of registering titles was again resumed in a more certain and simplified manner.

These experienced examiners and title experts soon realized the other shortcomings in the statute as it now stood, and beginning in 1920 they banded together as an association to devise and recommend to the Legislatures the additional amendments needed to perfect the law. Every year from 1920 to 1926 bills were drafted by the examiners and introduced in the Legislature, hearings were held, favorable committee reports were had in some cases, but the proposals were not adopted. It is interesting to note that the Official Examiners of Title in Cook County, Illinois, have reported that each time they prepared amendments to their law and submitted them to the Illinois Legislature, the same were unanimously adopted and enacted. Just why such a different attitude was taken by the New York Legislatures has been somewhat of a mystery. However, in the year 1926, a bill was enacted into law that contained the proposals of the official examiners down to that time. Important changes were made that made operations more certain and facilitated registrations by eliminating some of the objections that had been raised in construing the law in definite registration cases that arose and could not be settled without a judicial court ruling.

From 1926 to 1929 the official examiners continued their work of proposing and recommending additional amendments, and in the latter year secured the enactment of another bill providing for valuable changes in the law. A complete revision of the fees payable in a registration proceeding was made and all uncertainty as to amounts of fees payable was cleared up since a separate nominal fee was made for each distinct transaction at the registrar's office or in the course of the registration of the title itself. Complete control over the official examiners of title was lodged in the Appellate Divisions of the Supreme Court, and the regulation of their work, duties and responsibilities was thus transferred from the Registrar, who makes the initial appointment, to the Courts. Official examiners, being county officials, have to be appointed under other county officials, pursuant to Constitutional provisions and constructions. The most important change under the 1929 amendments was the establishment of the Assurance Fund as a state or county trust fund. Prior to that time, the assurance fund fees were collected by the Registrars and turned over to the County Treasurers or the City Chamberlain in the greater city. They were not separately kept but were used for general purposes or for the reduction of the public debt. There has existed a provision in the law that the county would not be held responsible for losses incurred in registration beyond amounts credited to the fund. A ridiculous situation arose, since there actually was no tangible fund because the fees collected had been promptly disposed of as soon as accounted for. Many learned attorneys have questioned the constitutionality of this provision of the law, but no case has arisen wherein it might have been contested or litigated with the object of obtaining a judicial interpretation. Effective July 1, 1929, all payments into the Assurance Fund were to be set aside by the custodian of the fund as a trust fund and accordingly accounted for. It was also provided that all payments theretofore made to the fund were to be credited to this new trust fund, but unfortunately the Corporation Counsel of the City of New York in a very questionable opinion ruled that the language of the amendment was not sufficiently mandatory to compel the restoration of all funds collected prior to the aforesaid date.

In order to correct this unforeseen objection, the official examiners prepared a remedial amendment covering this point, and also some other changes and offered them to the 1931 Legislature for enactment, and on the final day of the session the bill was passed and received the approval of the executive. Under this bill, all amounts previously received in the Assurance Funds were directed to be appropriated and credited to the fund. Additional safeguards in the matters of transfers of registered property were enacted, and several minor changes adopted to expedite business. Then for the first time under The Torrens System, this state has added to its law a provision and procedure whereby a title once registered may be withdrawn from the registry even after it has been registered, upon proper cause being shown to the Supreme Court that it is no longer practicable or expedient to continue the registration. This idea is in itself entirely foreign to the subject of land registration, where it has been the uniform practice that once a title was registered it remained registered, and there was an implied covenant running with the title that it should be so. Peculiar conditions arose in the metropolitan areas where lots and parcels of land were assembled for building construction and development and it was found that some were registered and some were not. It was difficult to handle such titles jointly, and it has been asserted that conditions required that in such cases either the unregistered titles would have to be registered, or else the registered ones would have to be withdrawn from registration. That condition got so acute in 1928 that two special and private bills were passed and enacted into law permitting specific titles to be withdrawn under a special process. In 1929 there appeared some more similar bills, and when in 1930 the number of such attempts had grown so large, the Executive asserted a general bill for withdrawals would be preferred. Upon the passage in 1931 of such private bills, the Governor promptly vetoed as many as five of them. Circumstances then

brought about the passage of the Messer-Nunan bill.

But after the efforts of the past ten years, all changes in the New York title registration statute necessary for its efficient operation have been accomplished. The official examiners know of no further changes necessary to attain the desired ends. A title that is now registered in this state is one that is indefeasible and stands as against any one in the world. It just simply cannot be upset, nor the owner of the title ousted from his possession. The process of the registration has been reduced to the minimum of judicial process of law, as is guaranteed by the federal and state constitutions. The fees have been fixed and established at the minimum amounts necessary to carry on operations and services due property owners. Subsequent to initial registration no extensive searches are required, for the exact condition of a registered title always appears on the original certificate of title filed in the registrar's office, ever open to inspection and examination. No lien whatever can attach to that particular title until it has been duly entered on that certificate and signed by the Registrar. To transfer or mortgage such a title is but the most simple routine, and closings can be had within a few minutes after the inspection of but one record in the recording office. And the fees for such transactions are but nominal and always uniform.

Additional payments are now provided for the Assurance Fund, by means of transferring part of the fees received by the registrar to such fund, without any additional cost to the parties in interest. This in time will tend to increase the amount in the fund to provide compensation for those who lose some right, title or interest in any registration proceeding. In connection with this, it might be set forth here that there has never been any claim for a loss presented in this state in the twenty years that the system has been in use. And in the states of Illinois and Massachusetts where the system has been in very active use for over forty years, and where large assurance funds have been accumulated, the writer has heard of but one loss that occurred and for which money had to be taken from the fund to compensate. That record clearly shows the care with which the officials charged with the administration of the law perform their duties, but it shows the ever-watchfulness of the courts that finally passes upon the work of the said officials.

With an almost perfect statute now on the law books of the state relating to titles to land, it remains to be seen whether the property owners, realty operators and investment agencies will take advantage of its reliability and its use extensively. Up to now, it cannot be said that this law has been taken advantage of by the people of the state at all. And the reasons are patent. Some few years ago this writer, while in communication with Sir Charles Brickdale, for many years Commissioner of His Majesty's Land Office in London, summed up the situation in this state by writing that the Torrens Law was little availed of in New York because:

"Of the fact that most people who own property in the state are entirely ignorant of the existence of this law, and have never heard of the great advantages it affords them in the security of their realty holdings;

"Of the fact that so very few of the attorneys and realtors of the state are aware of the provisions of the law and the ease and facility with which they could handle their clients' business property matters under the law rather than through the system of corporate title insurance policies;

"Of the fact that the very officers and public officials charged with the administration of the law are so very indifferent to the law and their duties under it, and their general apathy towards it."

During the writer's tenure in the County of Kings much has been said relative to the so-called opposition of the title insurance companies to the Torrens System in this state. Perhaps in some instances, and probably in the early stages of operation under the law, this was true. But at the present time it is very much doubted and largely discounted. It must be remembered that capable and efficient officers handle the affairs of the huge title insurance companies as they exist today and they are ever alert to ways and means to increase business. Within a few minutes' time in an interview any official examiner of title could show and prove to the satisfaction of any title insurance official that for his company to make active use of the Torrens System would cut their overhead and searching expenses about ninety per centum, and for a cooperative use of the system their returns or earnings would be vastly increased with no effort at all. If the knowledge of these facts has not yet dawned upon these companies and their officials, the realizations cannot be much longer delayed. Experience in two other great states where the system is widely used indicates that the use thereof by the title insurance companies of those states has resulted most favorably to the said concerns.

The thought of all writers on the question of land titles for the past few decades has been that some new method must be devised for title transactions owing to the enormous piling up and creation of records in the recording offices of the counties and of the states. Sir Robert Torrens had that idea in mind when he devised his registry system in Australia in 1856. Day by day as time goes on and the records pile up, the wisdom of his scheme becomes more patent, and the necessity for its universal use becomes more clear. At last, in New York state, we now have the machinery created and smoothly working for the expeditious handling of all property title matters. It merely awaits the use of its facilities by the public for whom it was supplied.

No comment or review of this question would be complete without a reference to the work and endeavors of those who have worked and labored to the end that we could secure the present statute. After the situation had been duly studied and remedies found that would improve the law, it was quite difficult to have it urged upon the Legislatures for there was nothing in the technical amendments that would appeal to any member of the legislature in a way that would call forth his best efforts to secure favorable consideration. Fortunate indeed were the Official Examiners when in 1926 they were able to enlist the help of Hon. Edward E. Fay, Assemblyman from Kings County, now United

States Commissioner for the Eastern District of New York, Federal Service, and Hon. Philip M. Kleinfeld, Senator from Kings County, who secured the enactment of the bill of that year. The 1929 amendment bill was promoted by Senator Kleinfeld and by Hon. Wilson Messer, Assemblyman from Steuben County, who disclosed real interest in the work. And finally in this year, it was again Assemblyman Messer and Hon. Joseph D. Nunan, Jr., in the Senate, that secured the favorable action so much needed.

Under the law today the County Clerks of the Counties, or the Registers of the Counties having Registers of Deeds, are designated as the Registrars of title for the Torrens System. It is required of them that they organize in their offices a special department to handle the work and records of registering titles to land and preserving all original documents in connection therewith, for all such papers are filed under this system rather than recorded and returned to the parties in interest. Adequate help such as clerks, examiners and surveyors in addition to official examiners should be assigned to this department of the recording office. In fact every facility for the smooth working of the law has been authorized and provided for by the law itself. Yet after a canvass of the recording officers of the counties of this state, the writer found many registrars were actually unaware of the registration act entirely. Very few of them had even equipped their offices for registration proceedings and only in the metropolitan counties had official examiners been appointed to carry on the work. In counties where no such official had been appointed it had been necessary to have temporary designations made by the Supreme Court. Where the business of registration has mildly progressed there are as yet no fully equipped offices to properly attend to the routine. A sudden trend towards the registration of titles in any county would cause immediate delay in the securing of certificates for this reason. After many years' experience as an official examiner of title, the writer has found but one Registrar that was so officially interested in registrations that he did everything possible to promote the system. Doubtless when these conditions are removed and better facilities provided a wider use of the safeguard of title, registration will ensue. It is a change that time will ultimately bring about, if nothing else.

THE HARVARD LEGAL AID BUREAU

By Tilford E. Dudley

President, Legal Aid Bureau 1930-31

UNIQUE in the legal aid field[1] and new in the world of legal education is the legal aid clinic which is a law office composed of advanced students in a law school. Its purpose is twofold: first, to help members of the community who are too poor to hire a regular attorney in those cases where they need a lawyer's services, and, second, to give students the practical education that comes from the experience of handling real cases. At present there are well established student clinics at Northwestern, Cincinnati, Minnesota, Southern California, and Harvard, as well as at least eight others in the experimental stage.[2]

The pioneer clinic, from the point of view of origin, is undoubtedly the one at Harvard. In 1893 the idea was tried for a year by Prof. Wambaugh as an experiment, and in the college year of 1912-13 it was started permanently by the students on the law committee of the Christian Association.[3] For nineteen years now, the Harvard Legal Aid has been giving free service to the financially embarrassed of Cambridge, Mass., and legal experience to its own members. During that time it has handled over 2,500 different cases of varying nature requiring the giving of advice, mediation, or court work. The high quality of the legal work is shown by the fact that 75% of the cases going to court were won and that 12% of the remainder were satisfactorily settled. It has also earned the recommendations of local government officials and has increased the number of new cases handled during the six months it is open each year to nearly 300 and the annual collections for clients to $2,600.00.

The Bureau does not accept criminal cases because of inadequate facilities and will act on domestic relation cases only after consulting a reliable social agency. However, about 13% of its cases concern domestic troubles. About 15% are landlord-tenant controversies, with debts and loans coming next. Contrary to the usual legal aid policy, Harvard takes personal injury cases if, disregarding the injury and possible financial recovery, it is believed that the client would have been unable to retain an attorney for legal matters. The recovery of damages only puts the client back into his original position which, by hypothesis, is one of inability to hire lawyers and hence is within legal aid territory. But these comprise less than 7% of the cases handled. Moreover, 37% of the Bureau's cases are disposed of with advice; the rest are settled, and only a few go to court.

The Harvard Legal Aid is financially supported by the Harvard Law School, but is otherwise completely independent. It is composed entirely of students, 16 being chosen from the second-year class on the basis of scholarship and 16 from the third-year class on the same consideration plus that of the previous year's experience on the Bureau.

At some clinics, notably the one at the University of Southern California, a regular law course in legal aid work is made compulsory for all seniors.

1. For well-known writings on the growth of this movement and its great importance in bringing justice to the poor, see McGuire, *The Lance of Justice* (1928); *Growth of Legal Aid Organizations in the United States* (1926); Smith, *Justice and the Poor* (1921).

2. See Bradway, *Nature of a Legal Aid Clinic* (1930) 3 So. Calif. L. Rev. 174.

3. Called The Phillips Brooks House.

Besides the above mentioned casework, it includes a professor, classroom lecturers, notebooks, exams, grades, and credit.[4] At other places such as Northwestern, the clinic consists of working in a city legal aid office under the close supervision of regular attorneys. But Harvard does neither. The work is done for the honor and experience — not for scholastic credit. It is a voluntary, extra-curricular course (like the Ames Competition between the students' law clubs) and is successful because of the traditional Harvard policy of merely offering opportunities to the student and letting him develop his own individuality without any whip or check. The professors do not interfere and usually do not even know what is going on, unless called upon for advice in some perplexing case.

For ten years the Northwestern system was tried and part of the men were sent to work in the Boston Legal Aid office, but the plan did not succeed. Its failure showed that at least Harvard men get little from merely hanging around a well organized office in which they are superfluous and trying to make themselves useful on cases for which someone else has the responsibility. But this is entirely different from the proposition of letting each student bear full responsibility for his case and giving him means of getting information from his elders when it is needed. The student should be the one to do the worrying, to discover what law points are involved, how he can present them to a court, and what proceedings either in or out of court would be most practical for a solution fair to his client and to the other parties.

Thus the Harvard Legal Aid is an organization entirely of and by students. However, this does not mean that all existing compilations of knowledge and experience are disregarded. The Bureau has an excellent library and is also developing a collection of forms and elementary descriptions of steps to be taken in typical actions. Moreover, an effort is made to associate older members with new ones in order to save the latters' time and errors, and all members visit the Boston Legal Aid in the fall to become orientated and to see how a good legal aid office is run.

A course of twelve lectures on Mass. practice was given last year by local court and police officers, lawyers, and professors. These talks conveyed the results of experience and small but important points which can not be found in books. During this current year of 1931-32, several of these will be replaced by similar talks from the experienced third-year members of the Bureau, thus making the association even more self-sufficient.

The Bureau also retains a local practicing attorney to spend an afternoon each week in the Legal Aid office and advise the members on the conduct of their cases. His function is not to replace the industry of the students in discovering the law, nor to manage the cases himself with the students as office boys. Each student is expected to do his utmost in looking up the law, the procedure, and the practical steps to be taken. It is when he gets lost that he may turn to the adviser for assistance rather than waste weeks in fruitless search for information that only an experienced lawyer would have. If the student is successful in getting what he considers to be the important information, he is then to submit his case and plans to the adviser for a final inspection in order to anticipate any errors that might have been overlooked and would injure his client. This arrangement ought to provide the best of service for the client and give the student valuable clinical experience similar to that now given by the medical profession.

The social value of the Legal Aid to the members of the community can scarcely be doubted. And for the student who practices in the same jurisdiction where he takes his legal aid work, the educational value is equally obvious. But the benefit to the student from distant states is limited, and this imposes a limit on the pedagogical value of the clinic in a national law school. There, time spent on learning local pecularities and locations of buildings would be better appropriated to study for a regular course.

However, this is merely a limiting and not a destroying consideration. There are still gaps in the courses of the national schools which a legal aid can fill. These schools usually train the student for office and appellate court work. They seek to develop within him the power of legal reasoning.[5] Consequently, little is taught about actual practice, about how to examine clients and witnesses and to separate facts from gossip and the relevant from the irrelevant. This ability is developed only by the legal aid.

Furthermore, although the American Bar Association has recommended compulsory courses in legal ethics,[6] Harvard does not even offer any. However, the legal aid experience includes a very practical one. It also teaches students how to work with statutes, ordinances, administrative officers, and public commissions which the usual law course ignores. It teaches one that all which is legal is not practical and all that is practical is not legal. It teaches him that there are many ways of handling the same kind of cases and that he must define his objective and skillfully plan his attack by choosing the right alternatives at the very beginning. It also provides a needed synthesis[7] for the three years' law courses and welds them together into a workable unit. And finally, the legal aid clinic instills within the student the habit of unselfishly helping less fortunate people and an appreciation of his responsibilities and opportunities for making this a more harmonious society. Instead of being a gladiator for those clients who can pay, the student becomes a agent of understanding.[8]

Since the content of this training does not vary from jurisdiction to jurisdiction and since it is only poorly given by the law offices[9] and not at all by the law schools,[10] there arises a need for a legal aid clinic in every law school. With a good system for passing information on to succeeding generations and a competent advisor on local experience, time spent on learning local peculiarities can be greatly reduced and carefully guided at-

4. See Bradway *Handbook of the Legal Aid Clinic of So. Calif.* (1930) for the best detailed account of how such a clinic and course may be organized. Prof. Bradway is now preparing a casebook also.

5. See Dean Ames' comment in 31 A. B. A. Rep. (1907) 1025.

6. See Kinnane, *Compulsory Study of Professional Ethics by Law Students* (1930) 16 A. B. A. J. 222.

7. See Redlich *The Common Law and the Case Method in American Law Schools*, 45.

8. Bradway's *Legal Aid Clinic as a Law School Course* (1930) 3 So. Calif. L. Rev. 320 gives a good statement of the educational values obtained at Los Angeles.

9. Wigmore, *The Legal Clinic* (1917) 12 Ill. L. Rev. 35.

10. See Reed, Training for the Public Profession of the Law (1921) 286.

tention can be given with great effect to acquiring that experience which will be valuable everywhere. By a constantly evolving organization, the Harvard Legal Aid Bureau is approaching that objective in its individualistic way. Other schools may well develop similar organizations which will give their members an educational benefit that will make their expenditure of time worth while and better equip them for the practice of law in any jurisdiction.[11]

11. For a more detailed discussion of this general topic, see Dudley, *The Harvard Legal Aid Bureau: A History and Announcement* (1930).

LEGISLATION AND EFFECTIVENESS OF LAW

(*Continued from Page* 650)

administrative departments charged with enforcing the law, and not to the legislature which enacted it.

III.

It would appear to follow from what has been said that the common opinion that we have too much legislation in this country is unwarranted if it rests on no better ground than the mere numerical total of statutes passed, or than the argument that the subject-matter of many of our enactments is of a character which does not properly permit of legislative regulation. Neither the number of enactments nor the nature of their subject-matter affords persuasive evidence of excess. This does not mean, however, that it may not still be true that we have too much legislation. It merely means that if we do, it is for some other reason than those ordinarily alleged, and I wish myself to suggest a reason which I think will properly support the charge that our legislatures are guilty of overproduction.

This reason, which it seems to me should bear the responsibility for our overproduction of statutory enactments, is nothing less than another of those widespread and oversimplified commonplaces of public opinion which are accepted as statements of fundamental truth and acted upon as such. I refer to the conviction held by many of us as a matter of course that all rules and regulations of conduct to be enforced by public authority must emanate directly from no less high a source than the supreme lawmaking body, the legislature itself. This idea is a corollary of the so-called "theory of separation of powers" which is supposed to be fundamental in our American form of government. If it is true, as the theory of separation of powers seems to require, that "legislative power can only be exercised by the legislature," it follows necessarily that every rule and regulation enforced by the state must be the direct and immediate product of the legislature itself and may not emanate from any other source. The result is that if it seems desirable to prescribe a rule of conduct, no matter how relatively insignificant or confined in its operation to matters of technical or minor detail, such a rule must none the less pass through the legislative mill, come forth in the full dignity of a statute and swell the total number of pages of the statute book. The result is that the statute book teems with minute and detailed enactments. Leaving out of account statutes relating to minutiae of state and local government, such as those which authorize the purchase of books or the employment of stenographers for particular bureaus and offices, and looking only at statutes regulating the conduct of private individuals, we find the same character of minute detail in the latter field as in the former. If we seek for an example among the enactments of the Pennsylvania legislature of 1929 which we have already considered, we find that in the building code for cities of the first class (Act No. 413) the legislature itself prescribes with minute particularity the composition of various kinds of building mortar—as for example in Section 1102: "Cement mortar shall be made of cement and sand in the proportion of one part cement and not more than three parts sand by volume. High graded lime not to exceed 50% of the cement by volume may be added but shall not be considered as reducing the cement content." The Act goes on to prescribe numerous engineering formulae, such as that for the allowable load on piles, e. g. "Where the pile is driven by drop hammers the load shall be determined by the formula $P = 2WH/(S + 1)$; when driven by single-acting steam or air hammers, $P = 2WH/(S + 1/10)$." The Act contains numerous other mathematical formulae, e. g. for determining allowable stresses on iron and steel skeleton girders and beams, and the like.

The inclusion of material of this kind in the statute book has several disadvantages. Perhaps the chief is that it freezes into the permanent rigidity of law detailed matters of technical practice which are constantly becoming obsolete with the improvement of the art, thus setting up a conflict between law on the one hand and the best technical practice on the other, which can only be resolved by constant resort to the difficult and clumsy process of amending the statute. This has happened frequently in the case of enactments of this character, one instance being the case of the detailed technical requirements of the Federal statutes for the regulation of steam-boat boilers, which are said to have been outdistanced by improvements in the science of boiler manufacture with resulting inconvenience due to the obsolete nature of the statutory requirements. In the second place regulations of this technical character cannot be competently framed by a legislative body consisting of laymen. They must in the nature of things originate from some body of technical experts and the process of passing them through the legislature can rarely add anything of value since the members of the legislature do not have the competence to criticize them intelligently. All that the statutory enactment of such regulations accom-

plishes is to give them a permanence and fixity which they seldom deserve.

For this reason it is becoming more and more customary not to embody such regulations in statutory enactments at all, but rather to establish by statute expert administrative agencies empowered to frame rules and regulations within the field of jurisdiction committed to them, and to amend and revise such regulations from time to time. It is thus insured that the regulations will emanate from the kind of body best fitted to formulate them and will be subject to revision by a more rapid and easy process than statutory amendment. This practice of delegating rule-making power to administrative authorities has already become so widespread in this country that it is no longer possible under the decisions of the courts to claim that it violates the principle of separation of powers as properly understood. It is a practice followed in many Pennsylvania statutes. Thus, for example, among the statutes passed by the legislature of 1929, those which deal with the grading and selling of grapes and the certification of seed potatoes (Act No. 97—Act No. 205) do not undertake to embody definitions of standards in the statute itself, but vest authority in the Department of Agriculture to establish such definitions and amend them from time to time.

It may be argued that the vesting of quasi-legislative powers of this kind in administrative officials creates a danger of abuse and sets up a temptation to official corruption and extortion. It is hard to see how this danger is any greater where administrative officials are entrusted with quasi-legislative powers than where they are entrusted with other powers which must necessarily be vested in them to enable them to perform duties of law-enforcement. Opportunities for corruption and extortion exist wherever powers of any kind are vested in officials; but unless officials are vested with power of some kind there is no excuse for their existence. The only way to completely eliminate the temptation and opportunity to abuse an office is to abolish the office. The well established rule of law that regulations of a quasi-legislative character made by an administrative officer are always subject to examination in the courts to determine whether or not they remain within the limits marked out by the statute, supplies ample safeguard against abuse, and gives complete protection in this country against administrative usurpations of the character recently criticized in England by Lord Chief Justice Hewart in his book, "The New Despotism."

Failure to take advantage to the proper extent of the opportunity of delegating legislative functions to administrative bodies affords, I suggest, a sound and substantial reason for the charge that the quantity of legislation contained in our statute books is excessive. A second reason, and one which operates not so much in the field of regulatory legislation as in the field of general private law, is the scattered and haphazard and piece-meal character of most of our statutes, and especially in this field. They originate from casual and disconnected sources. There is no general oversight over them, with the frequent result that a new statute is enacted without taking into account some already existing statute so that a still further amendment becomes necessary to bring the two into harmony and to accomplish the object intended. Something is being done in many states, our own among the number, to remedy this situation by the establishment of legislative reference bureaus and drafting bureaus. A well-equipped drafting bureau undertakes to examine and revise bills before their introduction, and even to prepare them, in order to see that they harmonize with existing law and accomplish the objective desired by their sponsors. The work of this character which has been done in recent years by the legislative counsel attached to the Senate and House of Representatives at Washington is an outstanding and convincing illustration of what a legislative drafting bureau with proper support and recognized standing can accomplish.

Our Pennsylvania legislation as it comes through the legislative mill today is by no means free from the inconsistencies and anomalies due to casual origin and careless draftsmanship and resulting in unnecessary multiplication of enactments to correct and eliminate mistakes. The situation is illustrated by one instance in the 1929 statute book. Act No. 84 of the Laws of 1929 is an amendment to the Act of 1901 which authorizes corporations to acquire, hold and dispose of the shares and obligations of other corporations. The amendment made by Act No. 84 consists of adding to the original Act words which permit corporations to hold the obligations "of any state or of United States or of any territory or dependency thereof or of any foreign country or any subdivision thereof." This Act was approved March 27th, 1929. Less than a month later, on April 18, 1929, was approved Act No. 241 which without making any reference to Act No. 84 purported also to amend the same section of the Act of 1901. Actually the purported amendment made the section read exactly as it had always read prior to Act No. 84, i. e. without containing any reference to the type of public securities which Act No. 84 had undertaken to add to the provisions of the original Act.

I do not happen to have what is called "inside information" about the circumstances surrounding these two enactments, but taken together they seem to offer an admirable illustration of the sort of overproduction of statutes which causes the most burdensome inconvenience for those whose conduct they affect and for the bench and bar.

The truth of the matter is that the statutory amendment of our corpus of general private law has itself become a technical matter of a kind which our legislative bodies cannot be expected to perform satisfactorily without expert guidance. Our private law has become necessarily so rich and various to meet the manifold needs of our complex society that hardly any member of the bar is fully familiar in detail with more than a few portions of it. A member of the legislature merely because he happens to be a lawyer is therefore seldom able by his unaided efforts to frame amendments as effective and satisfactory as those which would be formulated by a group of members of the bar who have specialized competence and experience in the field of law affected by the amendment. It is therefore becoming increasingly important that bar associations through their legislative committees should

supply aid and advice to the legislature and do much of the preparatory work required for the amendment of the law in any satisfactory way. More and more it is going to be necessary for permanent committees to keep steadily and constantly at work on the preparation of proposed revisions of different departments of the law. Only in this way can we avoid the overproduction of useless legislation, whose uselessness consists in failure to take account of existing law and in careless draftsmanship which makes it ineffective to accomplish its intended results or any results whatever.

When we view the matter of legislative overproduction in its proper light, it will therefore be found, I believe, to raise issues and involve considerations other than those which are commonly suggested in public discussion. The questions which it raises are not so much the spectacular and contentious issues of interference with individual liberty or invasions of the proper sphere of morality and custom; rather they are dry and thorny questions of the technical details of statutory drafting and of maintaining the consistency and cumulative effect of enactments. We, as lawyers, are in a position to appreciate the importance of these technical matters in which the root of the evil lies; and it is our task to hold them steadily in view and do our part in shaping a program of improvement without being led astray or swept aside by the emotional appeal of popular ideas which are infected with the fallacy of oversimplification.

The American Law Institute and the Young Lawyer's Opportunity

(*Continued from Page* 665)

which a brief or opinion or memorandum of authorities prepared by him may at some time be of help to others. Again and again at such meetings I have seen the way pointed to the answer to a difficult question on the basis of an experience of ten or fifteen or perhaps even thirty-five or forty years back. How valuable it would be to bring to such a meeting the result of a study of all the Pennsylvania cases on Contracts or Torts or Property or Agency or Corporations or Trusts or Conflict of Laws, that delightful study which brings you into contact with every other branch of the law. If a club should be formed of the men in a single office which should carry to completion the work of annotating the restatements, and if one member should be added to do work of similar quality in Federal jurisprudence, the office so equipped would be well nigh invincible. Nothing like it has ever existed within a hundred miles of the place where my lot has been cast, and I might tell the truth if I should expand the hundred miles to a thousand.

In the fourth place—and "lastly"—if you carry out this program you will pay a debt. In the preface to his "Maxims" Lord Bacon well said, "I hold every man a debtor to his profession; from the which as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves by way of amends to be a help and ornament thereunto." Can you pay that debt better than by being of help in your own place in "the clarification and simplification of the law and its better adaptation to the needs of life?" And you may be assured that such a payment of the debt will be received with thanks. Before venturing to make the suggestion of this talk to you, I submitted the plan briefly in writing to the Institute's Adviser on Professional and Public Relations. I received forthwith a letter from him in which he said:

> "I think very well indeed of your idea. Such a study of the Restatements by groups of well trained young lawyers would catch a good many things in which the Restatement could be improved. Most of these would probably be in language and form of expression, but all that is valuable. In the second place, it would be of very great help to local committees who are annotating or assisting in the annotation of the Restatements. In many States there is not as thorough an organization and great interest in the work as we have in Pennsylvania. If two or three young lawyers in —— would get interested in such a study they could do an immense lot for the Institute work and the improvement of the law in ——. In some of the States where the bar associations are not strong and not many at the bar have come from the stronger schools, it is difficult to get a working interest in either Restatement or annotations. In States like Pennsylvania the young lawyers' work would be helpful, in a State like —— it would be invaluable. I am sure that if you make such a suggestion to the men the Institute will not only be willing but anxious to help get their work articulated with that of the bar associations, so that it could count not only for the young lawyer, but for the Institute work as a whole. By all means send me a copy of your paper when you have it ready."

And may I add that if your work is articulated with that of the Institute I can testify on the basis of my own slight part in helping in the restatement that you will feel yourself well repaid for your labor? "This book of the law shall not depart out of thy mouth; but thou shalt meditate therein day and night, that thou mayest observe to do according to all that is written therein: for then thou shalt make thy way prosperous, and then thou shalt have good success."

Expert Lawyers in Germany—An Important Novelty of the Bar

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ABOUT half a year ago the German Lawyers Association started to introduce a novelty, which might be regarded abroad as an interesting reform: *The Expert Lawyer.*

This novelty was the result of the knowledge that the German barristers and solicitors (Rechtsanwaltschaft) are more and more threatened with loss of clients and work as a general feature of the economic evolution and of the conviction, on the other hand, that it is necessary to save the profession and to maintain it within the social order of the modern state.

On the Continent the profession of the barrister is a result of the French Revolution, born of the individualistic world of ideas of liberalism. The lawyer was professionally the guardian of the civic and human rights laid down by the liberal constitutions. He became the economically, politically and socially independent advocate against injustice and oppression. Hence the lawyer's profession grew with liberal individualism and was drawn backward equally by the growing influence of socialism as regards political and social life, which limited the superiority of individualism in favor of collectivism. This fact is shown by the example of Italy and Russia, where Fascism and Bolshevism led to the abolition of the lawyer's profession as such and to the formation of lawyers' trade unions with governmental supervision. In the above mentioned states the lawyer has ceased to be an independent representative and adviser to his client but acts as a semi-official organ of the legal authorities, and consequently it is no longer possible for him to protect the liberty and rights of the individual as an unfrightened servant of conviction. The German lawyers, in their greater part enthusiastic advocates of the rights of the social community, believed nevertheless that by an unlawful interference with the legally protected sphere of the individual, enormous values would have to be sacrificed, and that the legal profession in the social commonwealth is bound to fulfill its obligations towards the individual. Therefore it recognized the necessity to adapt itself to the spiritual movements of the present day as well as to maintain the tradition of the profession.

Towards the last mentioned goal lies the institution of the Fachanwaltschaft (Expert Lawyers), which was formed in order to maintain the tradition of assisting the individual in all his legal and social difficulties. Modern life has become indefinitely richer and more complex in comparison with a hundred years ago. Accordingly the object of law has also become much wider and more complicated. It is no longer possible for every lawyer to know the whole system of law in all its details. No brain can perform that task. Nevertheless a thorough mastering of the whole legal system is the condition sine qua non for an effective legal protection by the lawyer. Therefore the principles of distribution and rationalization of work require that the whole legal area be divided and worked by "special experts."

There were always lawyers in Germany, who specialized in single branches of law—in their way experts—and in that sense the conception of Fachanwalt is not at all revolutionary. But the real new institution in Germany consists in the fact that the legal student—even as an experienced lawyer—is officially enabled to train himself carefully and systematically in expert knowledge and, on the other hand, that this expert can introduce himself to the public by publication and recommendation, of course, without undue advertisement, in order to make a name whereto the public may resort in case of need.

The corresponding model was, of course, furnished by the medical profession, wherein specialists have been busy for centuries as a result of the public demand. It was objected, however, that the lawyer's profession was not of a similar kind, as in legal practice the individual case very seldom covered such a limited sphere as in the medical profession. This opinion was not mistaken; therefore, the new profession of "expert lawyers" was regulated by providing that no one should be entitled to become an "expert lawyer" until he had worked for five years at the bar, and further that no lawyer should be permitted to run such an expert office exclusively, but it must be united to his general work. For this reason the new Fachanwalt in Germany is not merely an expert, but a lawyer who is well acquainted with all branches of law.

The institution of the Fachanwaltschaft, at present in Germany still growing and improving, has been adopted up to the present only for those branches for which a need of experts was felt by the public in Germany. Following is a list of such branches: (1) Taxation Law; (2) Administrative Law; (3) Patents and Copyrights, Unfair Competition, Legal Protection of Industrial Property; (4) Labor Law; (5) Foreign Law.

Permission to obtain a license as Fachanwalt in one of those branches is given by the Anwaltskammer (the Board of the Lawyers Association), which is absolutely independent and free of governmental interference. The Anwaltskammer examines each application, just from the circumstances, however, without formal examination—that is, the qualification of a candidate is a matter of professional reputation—in order to prevent unqualified persons from acquiring the title "expert" for the single reason of increasing their income by an unjustified recommendation.

Since the introduction of this institution the German Anwaltskammer has admitted, during the the first months, about sixty Fachanwälte, of which more than twenty are experts for Taxation, about eight for State and Administrative Law, about twenty for Patents and Copyrights, etc., and ten for Foreign Law.

Of course, a member of the last group cannot be expected to be an expert in the laws of all foreign countries, but he is very well acquainted with the laws of some countries—which he generally includes in his title.

Time must tell whether this recently started experiment will have any success. But as far as

pliance with the rules of the Court of Appeals specially established, and after rigid examination as to qualifications by the state board of law examiners that regarded experience as a great factor in fitness. The operation of the law was changed from a mere law suit that was simply an action in personam to a special proceeding in rem, dealing more with the title to the land itself rather than with many and numerous individuals that might make up its ownership. Payment into the Assurance Fund of definite fees upon the first registration was now made compulsory in order to set up a fund to cover losses resulting from errors or omissions of the various officials charged with the administration of the statute.

Under this revision, official examiners were appointed in the counties within the city of New York and in some instances in the other counties of the state; and the work of registering titles was again resumed in a more certain and simplified manner.

These experienced examiners and title experts soon realized the other shortcomings in the statute as it now stood, and beginning in 1920 they banded together as an association to devise and recommend to the Legislatures the additional amendments needed to perfect the law. Every year from 1920 to 1926 bills were drafted by the examiners and introduced in the Legislature, hearings were held, favorable committee reports were had in some cases, but the proposals were not adopted. It is interesting to note that the Official Examiners of Title in Cook County, Illinois, have reported that each time they prepared amendments to their law and submitted them to the Illinois Legislature, the same were unanimously adopted and enacted. Just why such a different attitude was taken by the New York Legislatures has been somewhat of a mystery. However, in the year 1926, a bill was enacted into law that contained the proposals of the official examiners down to that time. Important changes were made that made operations more certain and facilitated registrations by eliminating some of the objections that had been raised in construing the law in definite registration cases that arose and could not be settled without a judicial court ruling.

From 1926 to 1929 the official examiners continued their work of proposing and recommending additional amendments, and in the latter year secured the enactment of another bill providing for valuable changes in the law. A complete revision of the fees payable in a registration proceeding was made and all uncertainty as to amounts of fees payable was cleared up since a separate nominal fee was made for each distinct transaction at the registrar's office or in the course of the registration of the title itself. Complete control over the official examiners of title was lodged in the Appellate Divisions of the Supreme Court, and the regulation of their work, duties and responsibilities was thus transferred from the Registrar, who makes the initial appointment, to the Courts. Official examiners, being county officials, have to be appointed under other county officials, pursuant to Constitutional provisions and constructions. The most important change under the 1929 amendments was the establishment of the Assurance Fund as a state or county trust fund. Prior to that time, the assurance fund fees were collected by the Registrars and turned over to the County Treasurers or the City Chamberlain in the greater city. They were not separately kept but were used for general purposes or for the reduction of the public debt. There has existed a provision in the law that the county would not be held responsible for losses incurred in registration beyond amounts credited to the fund. A ridiculous situation arose, since there actually was no tangible fund because the fees collected had been promptly disposed of as soon as accounted for. Many learned attorneys have questioned the constitutionality of this provision of the law, but no case has arisen wherein it might have been contested or litigated with the object of obtaining a judicial interpretation. Effective July 1, 1929, all payments into the Assurance Fund were to be set aside by the custodian of the fund as a trust fund and accordingly accounted for. It was also provided that all payments theretofore made to the fund were to be credited to this new trust fund, but unfortunately the Corporation Counsel of the City of New York in a very questionable opinion ruled that the language of the amendment was not sufficiently mandatory to compel the restoration of all funds collected prior to the aforesaid date.

In order to correct this unforeseen objection, the official examiners prepared a remedial amendment covering this point, and also some other changes and offered them to the 1931 Legislature for enactment, and on the final day of the session the bill was passed and received the approval of the executive. Under this bill, all amounts previously received in the Assurance Funds were directed to be appropriated and credited to the fund. Additional safeguards in the matters of transfers of registered property were enacted, and several minor changes adopted to expedite business. Then for the first time under The Torrens System, this state has added to its law a provision and procedure whereby a title once registered may be withdrawn from the registry even after it has been registered, upon proper cause being shown to the Supreme Court that it is no longer practicable or expedient to continue the registration. This idea is in itself entirely foreign to the subject of land registration, where it has been the uniform practice that once a title was registered it remained registered, and there was an implied covenant running with the title that it should be so. Peculiar conditions arose in the metropolitan areas where lots and parcels of land were assembled for building construction and development and it was found that some were registered and some were not. It was difficult to handle such titles jointly, and it has been asserted that conditions required that in such cases either the unregistered titles would have to be registered, or else the registered ones would have to be withdrawn from registration. That condition got so acute in 1928 that two special and private bills were passed and enacted into law permitting specific titles to be withdrawn under a special process. In 1929 there appeared some more similar bills, and when in 1930 the number of such attempts had grown so large, the Executive asserted a general bill for withdrawals would be preferred. Upon the passage in 1931 of such private bills, the Governor promptly vetoed as many as five of them. Circumstances then

brought about the passage of the Messer-Nunan bill.

But after the efforts of the past ten years, all changes in the New York title registration statute necessary for its efficient operation have been accomplished. The official examiners know of no further changes necessary to attain the desired ends. A title that is now registered in this state is one that is indefeasible and stands as against any one in the world. It just simply cannot be upset, nor the owner of the title ousted from his possession. The process of the registration has been reduced to the minimum of judicial process of law, as is guaranteed by the federal and state constitutions. The fees have been fixed and established at the minimum amounts necessary to carry on operations and services due property owners. Subsequent to initial registration no extensive searches are required, for the exact condition of a registered title always appears on the original certificate of title filed in the registrar's office, ever open to inspection and examination. No lien whatever can attach to that particular title until it has been duly entered on that certificate and signed by the Registrar. To transfer or mortgage such a title is but the most simple routine, and closings can be had within a few minutes after the inspection of but one record in the recording office. And the fees for such transactions are but nominal and always uniform.

Additional payments are now provided for the Assurance Fund, by means of transferring part of the fees received by the registrar to such fund, without any additional cost to the parties in interest. This in time will tend to increase the amount in the fund to provide compensation for those who lose some right, title or interest in any registration proceeding. In connection with this, it might be set forth here that there has never been any claim for a loss presented in this state in the twenty years that the system has been in use. And in the states of Illinois and Massachusetts where the system has been in very active use for over forty years, and where large assurance funds have been accumulated, the writer has heard of but one loss that occurred and for which money had to be taken from the fund to compensate. That record clearly shows the care with which the officials charged with the administration of the law perform their duties, but it shows the ever-watchfulness of the courts that finally passes upon the work of the said officials.

With an almost perfect statute now on the law books of the state relating to titles to land, it remains to be seen whether the property owners, realty operators and investment agencies will take advantage of its reliability and its use extensively. Up to now, it cannot be said that this law has been taken advantage of by the people of the state at all. And the reasons are patent. Some few years ago this writer, while in communication with Sir Charles Brickdale, for many years Commissioner of His Majesty's Land Office in London, summed up the situation in this state by writing that the Torrens Law was little availed of in New York because:

"Of the fact that most people who own property in the state are entirely ignorant of the existence of this law, and have never heard of the great advantages it affords them in the security of their realty holdings;

"Of the fact that so very few of the attorneys and realtors of the state are aware of the provisions of the law and the ease and facility with which they could handle their clients' business property matters under the law rather than through the system of corporate title insurance policies;

"Of the fact that the very officers and public officials charged with the administration of the law are so very indifferent to the law and their duties under it, and their general apathy towards it."

During the writer's tenure in the County of Kings much has been said relative to the so-called opposition of the title insurance companies to the Torrens System in this state. Perhaps in some instances, and probably in the early stages of operation under the law, this was true. But at the present time it is very much doubted and largely discounted. It must be remembered that capable and efficient officers handle the affairs of the huge title insurance companies as they exist today and they are ever alert to ways and means to increase business. Within a few minutes' time in an interview any official examiner of title could show and prove to the satisfaction of any title insurance official that for his company to make active use of the Torrens System would cut their overhead and searching expenses about ninety per centum, and for a cooperative use of the system their returns or earnings would be vastly increased with no effort at all. If the knowledge of these facts has not yet dawned upon these companies and their officials, the realizations cannot be much longer delayed. Experience in two other great states where the system is widely used indicates that the use thereof by the title insurance companies of those states has resulted most favorably to the said concerns.

The thought of all writers on the question of land titles for the past few decades has been that some new method must be devised for title transactions owing to the enormous piling up and creation of records in the recording offices of the counties and of the states. Sir Robert Torrens had that idea in mind when he devised his registry system in Australia in 1856. Day by day as time goes on and the records pile up, the wisdom of his scheme becomes more patent, and the necessity for its universal use becomes more clear. At last, in New York state, we now have the machinery created and smoothly working for the expeditious handling of all property title matters. It merely awaits the use of its facilities by the public for whom it was supplied.

No comment or review of this question would be complete without a reference to the work and endeavors of those who have worked and labored to the end that we could secure the present statute. After the situation had been duly studied and remedies found that would improve the law, it was quite difficult to have it urged upon the Legislatures for there was nothing in the technical amendments that would appeal to any member of the legislature in a way that would call forth his best efforts to secure favorable consideration. Fortunate indeed were the Official Examiners when in 1926 they were able to enlist the help of Hon. Edward E. Fay, Assemblyman from Kings County, now United

States Commissioner for the Eastern District of New York, Federal Service, and Hon. Philip M. Kleinfeld, Senator from Kings County, who secured the enactment of the bill of that year. The 1929 amendment bill was promoted by Senator Kleinfeld and by Hon. Wilson Messer, Assemblyman from Steuben County, who disclosed real interest in the work. And finally in this year, it was again Assemblyman Messer and Hon. Joseph D. Nunan, Jr., in the Senate, that secured the favorable action so much needed.

Under the law today the County Clerks of the Counties, or the Registers of the Counties having Registers of Deeds, are designated as the Registrars of title for the Torrens System. It is required of them that they organize in their offices a special department to handle the work and records of registering titles to land and preserving all original documents in connection therewith, for all such papers are filed under this system rather than recorded and returned to the parties in interest. Adequate help such as clerks, examiners and surveyors in addition to official examiners should be assigned to this department of the recording office. In fact every facility for the smooth working of the law has been authorized and provided for by the law itself. Yet after a canvass of the recording officers of the counties of this state, the writer found many registrars were actually unaware of the registration act entirely. Very few of them had even equipped their offices for registration proceedings and only in the metropolitan counties had official examiners been appointed to carry on the work. In counties where no such official had been appointed it had been necessary to have temporary designations made by the Supreme Court. Where the business of registration has mildly progressed there are as yet no fully equipped offices to properly attend to the routine. A sudden trend towards the registration of titles in any county would cause immediate delay in the securing of certificates for this reason. After many years' experience as an official examiner of title, the writer has found but one Registrar that was so officially interested in registrations that he did everything possible to promote the system. Doubtless when these conditions are removed and better facilities provided a wider use of the safeguard of title, registration will ensue. It is a change that time will ultimately bring about, if nothing else.

THE HARVARD LEGAL AID BUREAU

By Tilford E. Dudley

President, Legal Aid Bureau 1930-31

UNIQUE in the legal aid field[1] and new in the world of legal education is the legal aid clinic which is a law office composed of advanced students in a law school. Its purpose is twofold: first, to help members of the community who are too poor to hire a regular attorney in those cases where they need a lawyer's services, and, second, to give students the practical education that comes from the experience of handling real cases. At present there are well established student clinics at Northwestern, Cincinnati, Minnesota, Southern California, and Harvard, as well as at least eight others in the experimental stage.[2]

The pioneer clinic, from the point of view of origin, is undoubtedly the one at Harvard. In 1893 the idea was tried for a year by Prof. Wambaugh as an experiment, and in the college year of 1912-13 it was started permanently by the students on the law committee of the Christian Association.[3] For nineteen years now, the Harvard Legal Aid has been giving free service to the financially embarrassed of Cambridge, Mass., and legal experience to its own members. During that time it has handled over 2,500 different cases of varying nature requiring the giving of advice, mediation, or court work. The high quality of the legal work is shown by the fact that 75% of the cases going to court were won and that 12% of the remainder were satisfactorily settled. It has also earned the recommendations of local government officials and has increased the number of new cases handled during the six months it is open each year to nearly 300 and the annual collections for clients to $2,600.00.

The Bureau does not accept criminal cases because of inadequate facilities and will act on domestic relation cases only after consulting a reliable social agency. However, about 13% of its cases concern domestic troubles. About 15% are landlord-tenant controversies, with debts and loans coming next. Contrary to the usual legal aid policy, Harvard takes personal injury cases if, disregarding the injury and possible financial recovery, it is believed that the client would have been unable to retain an attorney for legal matters. The recovery of damages only puts the client back into his original position which, by hypothesis, is one of inability to hire lawyers and hence is within legal aid territory. But these comprise less than 7% of the cases handled. Moreover, 37% of the Bureau's cases are disposed of with advice; the rest are settled, and only a few go to court.

The Harvard Legal Aid is financially supported by the Harvard Law School, but is otherwise completely independent. It is composed entirely of students, 16 being chosen from the second-year class on the basis of scholarship and 16 from the third-year class on the same consideration plus that of the previous year's experience on the Bureau.

At some clinics, notably the one at the University of Southern California, a regular law course in legal aid work is made compulsory for all seniors.

1. For well-known writings on the growth of this movement and its great importance in bringing justice to the poor, see McGuire, *The Lance of Justice* (1928); *Growth of Legal Aid Organizations in the United States* (1926); Smith, *Justice and the Poor* (1921).

2. See Bradway, *Nature of a Legal Aid Clinic* (1930) 3 So. Calif. L. Rev. 174.

3. Called The Phillips Brooks House.

Besides the above mentioned casework, it includes a professor, classroom lecturers, notebooks, exams, grades, and credit.[4] At other places such as Northwestern, the clinic consists of working in a city legal aid office under the close supervision of regular attorneys. But Harvard does neither. The work is done for the honor and experience — not for scholastic credit. It is a voluntary, extra-curricular course (like the Ames Competition between the students' law clubs) and is successful because of the traditional Harvard policy of merely offering opportunities to the student and letting him develop his own individuality without any whip or check. The professors do not interfere and usually do not even know what is going on, unless called upon for advice in some perplexing case.

For ten years the Northwestern system was tried and part of the men were sent to work in the Boston Legal Aid office, but the plan did not succeed. Its failure showed that at least Harvard men get little from merely hanging around a well organized office in which they are superfluous and trying to make themselves useful on cases for which someone else has the responsibility. But this is entirely different from the proposition of letting each student bear full responsibility for his case and giving him means of getting information from his elders when it is needed. The student should be the one to do the worrying, to discover what law points are involved, how he can present them to a court, and what proceedings either in or out of court would be most practical for a solution fair to his client and to the other parties.

Thus the Harvard Legal Aid is an organization entirely of and by students. However, this does not mean that all existing compilations of knowledge and experience are disregarded. The Bureau has an excellent library and is also developing a collection of forms and elementary descriptions of steps to be taken in typical actions. Moreover, an effort is made to associate older members with new ones in order to save the latters' time and errors, and all members visit the Boston Legal Aid in the fall to become orientated and to see how a good legal aid office is run.

A course of twelve lectures on Mass. practice was given last year by local court and police officers, lawyers, and professors. These talks conveyed the results of experience and small but important points which can not be found in books. During this current year of 1931-32, several of these will be replaced by similar talks from the experienced third-year members of the Bureau, thus making the association even more self-sufficient.

The Bureau also retains a local practicing attorney to spend an afternoon each week in the Legal Aid office and advise the members on the conduct of their cases. His function is not to replace the industry of the students in discovering the law, nor to manage the cases himself with the students as office boys. Each student is expected to do his utmost in looking up the law, the procedure, and the practical steps to be taken. It is when he gets lost that he may turn to the adviser for assistance rather than waste weeks in fruitless search for information that only an experienced lawyer would have. If the student is successful in getting what he considers to be the important information, he is then to submit his case and plans to the adviser for a final inspection in order to anticipate any errors that might have been overlooked and would injure his client. This arrangement ought to provide the best of service for the client and give the student valuable clinical experience similar to that now given by the medical profession.

The social value of the Legal Aid to the members of the community can scarcely be doubted. And for the student who practices in the same jurisdiction where he takes his legal aid work, the educational value is equally obvious. But the benefit to the student from distant states is limited, and this imposes a limit on the pedagogical value of the clinic in a national law school. There, time spent on learning local pecularities and locations of buildings would be better appropriated to study for a regular course.

However, this is merely a limiting and not a destroying consideration. There are still gaps in the courses of the national schools which a legal aid can fill. These schools usually train the student for office and appellate court work. They seek to develop within him the power of legal reasoning.[5] Consequently, little is taught about actual practice, about how to examine clients and witnesses and to separate facts from gossip and the relevant from the irrelevant. This ability is developed only by the legal aid.

Furthermore, although the American Bar Association has recommended compulsory courses in legal ethics,[6] Harvard does not even offer any. However, the legal aid experience includes a very practical one. It also teaches students how to work with statutes, ordinances, administrative officers, and public commissions which the usual law course ignores. It teaches one that all which is legal is not practical and all that is practical is not legal. It teaches him that there are many ways of handling the same kind of cases and that he must define his objective and skillfully plan his attack by choosing the right alternatives at the very beginning. It also provides a needed synthesis[7] for the three years' law courses and welds them together into a workable unit. And finally, the legal aid clinic instills within the student the habit of unselfishly helping less fortunate people and an appreciation of his responsibilities and opportunities for making this a more harmonious society. Instead of being a gladiator for those clients who can pay, the student becomes a agent of understanding.[8]

Since the content of this training does not vary from jurisdiction to jurisdiction and since it is only poorly given by the law offices[9] and not at all by the law schools,[10] there arises a need for a legal aid clinic in every law school. With a good system for passing information on to succeeding generations and a competent advisor on local experience, time spent on learning local peculiarities can be greatly reduced and carefully guided at-

4. See Bradway *Handbook of the Legal Aid Clinic of So. Calif.* (1930) for the best detailed account of how such a clinic and course may be organized. Prof. Bradway is now preparing a casebook also.

5. See Dean Ames' comment in 21 A. B. A. Rep. (1907) 1025.

6. See Kinnane, *Compulsory Study of Professional Ethics by Law Students* (1930) 16 A. B. A. J. 223.

7. See Redlich *The Common Law and the Case Method in American Law Schools*, 45.

8. Bradway's *Legal Aid Clinic as a Law School Course* (1930) 3 So. Calif. L. Rev. 320 gives a good statement of the educational values obtained at Los Angeles.

9. Wigmore, *The Legal Clinic* (1917) 12 Ill. L. Rev. 35.

10. See Reed, Training for the Public Profession of the Law (1921) 286.

tention can be given with great effect to acquiring that experience which will be valuable everywhere. By a constantly evolving organization, the Harvard Legal Aid Bureau is approaching that objective in its individualistic way. Other schools may well develop similar organizations which will give their members an educational benefit that will make their expenditure of time worth while and better equip them for the practice of law in any jurisdiction.[11]

11. For a more detailed discussion of this general topic, see Dudley, *The Harvard Legal Aid Bureau: A History and Announcement* (1930).

LEGISLATION AND EFFECTIVENESS OF LAW

(*Continued from Page* 650)

administrative departments charged with enforcing the law, and not to the legislature which enacted it.

III.

It would appear to follow from what has been said that the common opinion that we have too much legislation in this country is unwarranted if it rests on no better ground than the mere numerical total of statutes passed, or than the argument that the subject-matter of many of our enactments is of a character which does not properly permit of legislative regulation. Neither the number of enactments nor the nature of their subject-matter affords persuasive evidence of excess. This does not mean, however, that it may not still be true that we have too much legislation. It merely means that if we do, it is for some other reason than those ordinarily alleged, and I wish myself to suggest a reason which I think will properly support the charge that our legislatures are guilty of overproduction.

This reason, which it seems to me should bear the responsibility for our overproduction of statutory enactments, is nothing less than another of those widespread and oversimplified commonplaces of public opinion which are accepted as statements of fundamental truth and acted upon as such. I refer to the conviction held by many of us as a matter of course that all rules and regulations of conduct to be enforced by public authority must emanate directly from no less high a source than the supreme lawmaking body, the legislature itself. This idea is a corollary of the so-called "theory of separation of powers" which is supposed to be fundamental in our American form of government. If it is true, as the theory of separation of powers seems to require, that "legislative power can only be exercised by the legislature," it follows necessarily that every rule and regulation enforced by the state must be the direct and immediate product of the legislature itself and may not emanate from any other source. The result is that if it seems desirable to prescribe a rule of conduct, no matter how relatively insignificant or confined in its operation to matters of technical or minor detail, such a rule must none the less pass through the legislative mill, come forth in the full dignity of a statute and swell the total number of pages of the statute book. The result is that the statute book teems with minute and detailed enactments. Leaving out of account statutes relating to minutiae of state and local government, such as those which authorize the purchase of books or the employment of stenographers for particular bureaus and offices, and looking only at statutes regulating the conduct of private individuals, we find the same character of minute detail in the latter field as in the former. If we seek for an example among the enactments of the Pennsylvania legislature of 1929 which we have already considered, we find that in the building code for cities of the first class (Act No. 413) the legislature itself prescribes with minute particularity the composition of various kinds of building mortar—as for example in Section 1102: "Cement mortar shall be made of cement and sand in the proportion of one part cement and not more than three parts sand by volume. High graded lime not to exceed 50% of the cement by volume may be added but shall not be considered as reducing the cement content." The Act goes on to prescribe numerous engineering formulae, such as that for the allowable load on piles, e. g. "Where the pile is driven by drop hammers the load shall be determined by the formula $P = 2WH/(S + 1)$; when driven by single-acting steam or air hammers, $P = 2WH/(S + 1/10)$." The Act contains numerous other mathematical formulae, e. g. for determining allowable stresses on iron and steel skeleton girders and beams, and the like.

The inclusion of material of this kind in the statute book has several disadvantages. Perhaps the chief is that it freezes into the permanent rigidity of law detailed matters of technical practice which are constantly becoming obsolete with the improvement of the art, thus setting up a conflict between law on the one hand and the best technical practice on the other, which can only be resolved by constant resort to the difficult and clumsy process of amending the statute. This has happened frequently in the case of enactments of this character, one instance being the case of the detailed technical requirements of the Federal statutes for the regulation of steam-boat boilers, which are said to have been outdistanced by improvements in the science of boiler manufacture with resulting inconvenience due to the obsolete nature of the statutory requirements. In the second place regulations of this technical character cannot be competently framed by a legislative body consisting of laymen. They must in the nature of things originate from some body of technical experts and the process of passing them through the legislature can rarely add anything of value since the members of the legislature do not have the competence to criticize them intelligently. All that the statutory enactment of such regulations accom-

plishes is to give them a permanence and fixity which they seldom deserve.

For this reason it is becoming more and more customary not to embody such regulations in statutory enactments at all, but rather to establish by statute expert administrative agencies empowered to frame rules and regulations within the field of jurisdiction committed to them, and to amend and revise such regulations from time to time. It is thus insured that the regulations will emanate from the kind of body best fitted to formulate them and will be subject to revision by a more rapid and easy process than statutory amendment. This practice of delegating rule-making power to administrative authorities has already become so widespread in this country that it is no longer possible under the decisions of the courts to claim that it violates the principle of separation of powers as properly understood. It is a practice followed in many Pennsylvania statutes. Thus, for example, among the statutes passed by the legislature of 1929, those which deal with the grading and selling of grapes and the certification of seed potatoes (Act No. 97—Act No. 205) do not undertake to embody definitions of standards in the statute itself, but vest authority in the Department of Agriculture to establish such definitions and amend them from time to time.

It may be argued that the vesting of quasi-legislative powers of this kind in administrative officials creates a danger of abuse and sets up a temptation to official corruption and extortion. It is hard to see how this danger is any greater where administrative officials are entrusted with quasi-legislative powers than where they are entrusted with other powers which must necessarily be vested in them to enable them to perform duties of law-enforcement. Opportunities for corruption and extortion exist wherever powers of any kind are vested in officials; but unless officials are vested with power of some kind there is no excuse for their existence. The only way to completely eliminate the temptation and opportunity to abuse an office is to abolish the office. The well established rule of law that regulations of a quasi-legislative character made by an administrative officer are always subject to examination in the courts to determine whether or not they remain within the limits marked out by the statute, supplies ample safeguard against abuse, and gives complete protection in this country against administrative usurpations of the character recently criticized in England by Lord Chief Justice Hewart in his book, "The New Despotism."

Failure to take advantage to the proper extent of the opportunity of delegating legislative functions to administrative bodies affords, I suggest, a sound and substantial reason for the charge that the quantity of legislation contained in our statute books is excessive. A second reason, and one which operates not so much in the field of regulatory legislation as in the field of general private law, is the scattered and haphazard and piece-meal character of most of our statutes, and especially in this field. They originate from casual and disconnected sources. There is no general oversight over them, with the frequent result that a new statute is enacted without taking into account some already existing statute so that a still further amendment becomes necessary to bring the two into harmony and to accomplish the object intended. Something is being done in many states, our own among the number, to remedy this situation by the establishment of legislative reference bureaus and drafting bureaus. A well-equipped drafting bureau undertakes to examine and revise bills before their introduction, and even to prepare them, in order to see that they harmonize with existing law and accomplish the objective desired by their sponsors. The work of this character which has been done in recent years by the legislative counsel attached to the Senate and House of Representatives at Washington is an outstanding and convincing illustration of what a legislative drafting bureau with proper support and recognized standing can accomplish.

Our Pennsylvania legislation as it comes through the legislative mill today is by no means free from the inconsistencies and anomalies due to casual origin and careless draftsmanship and resulting in unnecessary multiplication of enactments to correct and eliminate mistakes. The situation is illustrated by one instance in the 1929 statute book. Act No. 84 of the Laws of 1929 is an amendment to the Act of 1901 which authorizes corporations to acquire, hold and dispose of the shares and obligations of other corporations. The amendment made by Act No. 84 consists of adding to the original Act words which permit corporations to hold the obligations "of any state or of United States or of any territory or dependency thereof or of any foreign country or any subdivision thereof." This Act was approved March 27th, 1929. Less than a month later, on April 18, 1929, was approved Act No. 241 which without making any reference to Act No. 84 purported also to amend the same section of the Act of 1901. Actually the purported amendment made the section read exactly as it had always read prior to Act No. 84, i. e. without containing any reference to the type of public securities which Act No. 84 had undertaken to add to the provisions of the original Act.

I do not happen to have what is called "inside information" about the circumstances surrounding these two enactments, but taken together they seem to offer an admirable illustration of the sort of overproduction of statutes which causes the most burdensome inconvenience for those whose conduct they affect and for the bench and bar.

The truth of the matter is that the statutory amendment of our corpus of general private law has itself become a technical matter of a kind which our legislative bodies cannot be expected to perform satisfactorily without expert guidance. Our private law has become necessarily so rich and various to meet the manifold needs of our complex society that hardly any member of the bar is fully familiar in detail with more than a few portions of it. A member of the legislature merely because he happens to be a lawyer is therefore seldom able by his unaided efforts to frame amendments as effective and satisfactory as those which would be formulated by a group of members of the bar who have specialized competence and experience in the field of law affected by the amendment. It is therefore becoming increasingly important that bar associations through their legislative committees should

supply aid and advice to the legislature and do much of the preparatory work required for the amendment of the law in any satisfactory way. More and more it is going to be necessary for permanent committees to keep steadily and constantly at work on the preparation of proposed revisions of different departments of the law. Only in this way can we avoid the overproduction of useless legislation, whose uselessness consists in failure to take account of existing law and in careless draftsmanship which makes it ineffective to accomplish its intended results or any results whatever.

When we view the matter of legislative overproduction in its proper light, it will therefore be found, I believe, to raise issues and involve considerations other than those which are commonly suggested in public discussion. The questions which it raises are not so much the spectacular and contentious issues of interference with individual liberty or invasions of the proper sphere of morality and custom; rather they are dry and thorny questions of the technical details of statutory drafting and of maintaining the consistency and cumulative effect of enactments. We, as lawyers, are in a position to appreciate the importance of these technical matters in which the root of the evil lies; and it is our task to hold them steadily in view and do our part in shaping a program of improvement without being led astray or swept aside by the emotional appeal of popular ideas which are infected with the fallacy of oversimplification.

The American Law Institute and the Young Lawyer's Opportunity

(*Continued from Page* 665)

which a brief or opinion or memorandum of authorities prepared by him may at some time be of help to others. Again and again at such meetings I have seen the way pointed to the answer to a difficult question on the basis of an experience of ten or fifteen or perhaps even thirty-five or forty years back. How valuable it would be to bring to such a meeting the result of a study of all the Pennsylvania cases on Contracts or Torts or Property or Agency or Corporations or Trusts or Conflict of Laws, that delightful study which brings you into contact with every other branch of the law. If a club should be formed of the men in a single office which should carry to completion the work of annotating the restatements, and if one member should be added to do work of similar quality in Federal jurisprudence, the office so equipped would be well nigh invincible. Nothing like it has ever existed within a hundred miles of the place where my lot has been cast, and I might tell the truth if I should expand the hundred miles to a thousand.

In the fourth place—and "lastly"—if you carry out this program you will pay a debt. In the preface to his "Maxims" Lord Bacon well said, "I hold every man a debtor to his profession; from the which as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves by way of amends to be a help and ornament thereunto." Can you pay that debt better than by being of help in your own place in "the clarification and simplification of the law and its better adaptation to the needs of life?" And you may be assured that such a payment of the debt will be received with thanks. Before venturing to make the suggestion of this talk to you, I submitted the plan briefly in writing to the Institute's Adviser on Professional and Public Relations. I received forthwith a letter from him in which he said:

"I think very well indeed of your idea. Such a study of the Restatements by groups of well trained young lawyers would catch a good many things in which the Restatement could be improved. Most of these would probably be in language and form of expression, but all that is valuable. In the second place, it would be of very great help to local committees who are annotating or assisting in the annotation of the Restatements. In many States there is not as thorough an organization and great interest in the work as we have in Pennsylvania. If two or three young lawyers in —— would get interested in such a study they could do an immense lot for the Institute work and the improvement of the law in ——. In some of the States where the bar associations are not strong and not many at the bar have come from the stronger schools, it is difficult to get a working interest in either Restatement or annotations. In States like Pennsylvania the young lawyers' work would be helpful, in a State like —— it would be invaluable. I am sure that if you make such a suggestion to the men the Institute will not only be willing but anxious to help get their work articulated with that of the bar associations, so that it could count not only for the young lawyer, but for the Institute work as a whole. By all means send me a copy of your paper when you have it ready."

And may I add that if your work is articulated with that of the Institute I can testify on the basis of my own slight part in helping in the restatement that you will feel yourself well repaid for your labor? "This book of the law shall not depart out of thy mouth; but thou shalt meditate therein day and night, that thou mayest observe to do according to all that is written therein: for then thou shalt make thy way prosperous, and then thou shalt have good success."

Expert Lawyers in Germany—An Important Novelty of the Bar

BY DR. HANS LÖWENHEIM

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ABOUT half a year ago the German Lawyers Association started to introduce a novelty, which might be regarded abroad as an interesting reform: *The Expert Lawyer.*

This novelty was the result of the knowledge that the German barristers and solicitors (Rechtsanwaltschaft) are more and more threatened with loss of clients and work as a general feature of the economic evolution and of the conviction, on the other hand, that it is necessary to save the profession and to maintain it within the social order of the modern state.

On the Continent the profession of the barrister is a result of the French Revolution, born of the individualistic world of ideas of liberalism. The lawyer was professionally the guardian of the civic and human rights laid down by the liberal constitutions. He became the economically, politically and socially independent advocate against injustice and oppression. Hence the lawyer's profession grew with liberal individualism and was drawn backward equally by the growing influence of socialism as regards political and social life, which limited the superiority of individualism in favor of collectivism. This fact is shown by the example of Italy and Russia, where Fascism and Bolshevism led to the abolition of the lawyer's profession as such and to the formation of lawyers' trade unions with governmental supervision. In the above mentioned states the lawyer has ceased to be an independent representative and adviser to his client but acts as a semi-official organ of the legal authorities, and consequently it is no longer possible for him to protect the liberty and rights of the individual as an unfrightened servant of conviction. The German lawyers, in their greater part enthusiastic advocates of the rights of the social community, believed nevertheless that by an unlawful interference with the legally protected sphere of the individual, enormous values would have to be sacrificed, and that the legal profession in the social commonwealth is bound to fulfill its obligations towards the individual. Therefore it recognized the necessity to adapt itself to the spiritual movements of the present day as well as to maintain the tradition of the profession.

Towards the last mentioned goal lies the institution of the Fachanwaltschaft (Expert Lawyers), which was formed in order to maintain the tradition of assisting the individual in all his legal and social difficulties. Modern life has become indefinitely richer and more complex in comparison with a hundred years ago. Accordingly the object of law has also become much wider and more complicated. It is no longer possible for every lawyer to know the whole system of law in all its details. No brain can perform that task. Nevertheless a thorough mastering of the whole legal system is the condition sine qua non for an effective legal protection by the lawyer. Therefore the principles of distribution and rationalization of work require that the whole legal area be divided and worked by "special experts."

There were always lawyers in Germany, who specialized in single branches of law—in their way experts—and in that sense the conception of Fachanwalt is not at all revolutionary. But the real new institution in Germany consists in the fact that the legal student—even as an experienced lawyer—is officially enabled to train himself carefully and systematically in expert knowledge and, on the other hand, that this expert can introduce himself to the public by publication and recommendation, of course, without undue advertisement, in order to make a name whereto the public may resort in case of need.

The corresponding model was, of course, furnished by the medical profession, wherein specialists have been busy for centuries as a result of the public demand. It was objected, however, that the lawyer's profession was not of a similar kind, as in legal practice the individual case very seldom covered such a limited sphere as in the medical profession. This opinion was not mistaken; therefore, the new profession of "expert lawyers" was regulated by providing that no one should be entitled to become an "expert lawyer" until he had worked for five years at the bar, and further that no lawyer should be permitted to run such an expert office exclusively, but it must be united to his general work. For this reason the new Fachanwalt in Germany is not merely an expert, but a lawyer who is well acquainted with all branches of law.

The institution of the Fachanwaltschaft, at present in Germany still growing and improving, has been adopted up to the present only for those branches for which a need of experts was felt by the public in Germany. Following is a list of such branches: (1) Taxation Law; (2) Administrative Law; (3) Patents and Copyrights, Unfair Competition, Legal Protection of Industrial Property; (4) Labor Law; (5) Foreign Law.

Permission to obtain a license as Fachanwalt in one of those branches is given by the Anwaltskammer (the Board of the Lawyers Association), which is absolutely independent and free of governmental interference. The Anwaltskammer examines each application, just from the circumstances, however, without formal examination—that is, the qualification of a candidate is a matter of professional reputation—in order to prevent unqualified persons from acquiring the title "expert" for the single reason of increasing their income by an unjustified recommendation.

Since the introduction of this institution the German Anwaltskammer has admitted, during the the first months, about sixty Fachanwälte, of which more than twenty are experts for Taxation, about eight for State and Administrative Law, about twenty for Patents and Copyrights, etc., and ten for Foreign Law.

Of course, a member of the last group cannot be expected to be an expert in the laws of all foreign countries, but he is very well acquainted with the laws of some countries—which he generally includes in his title.

Time must tell whether this recently started experiment will have any success. But as far as

one can see today, there is a great interest by the public, especially by the large organizations of Industry and Commerce, which are favorable to the initiative shown by the lawyers' associations. One is entitled to feel that the public will be served in future better than in the past.

For the foreign observer, of course, the branch of Foreign Law is most interesting. The economic interdependence, the growing development of modern traffic, and the constantly increasing exchange of goods and labor which lessen the importance of border lines, produce a growing demand in foreign trade for a group of lawyers who are masters of the language and laws of one or several foreign countries. Any foreigner, who may be involved in a case, e. g., an English merchant who sells and buys goods from Germany, the Russian emigrant who intends to marry in the United States, the French author who is threatened by a violation of his copyrights in Japan, and the Spanish advocate who pleads at his bar, instructed by his Austrian Colleague on the claim of the latter's client, ought to be pleased to know a number of lawyers in each of those countries, who are able to take care effectively of their interests.

It is necessary that there be lawyers who not only possess a thorough knowledge of the Laws of their own countries but also know how to explain to their foreign clients and colleagues the differences in the laws concerned. How often has it happened that efficient cooperation between a lawyer and his foreign client was wrecked by the difference of tongue.

Anyhow it will not only interest the English Lawyer but also the English business man, who might possibly approve of the introduction of the institution "Fachanwalt" in Germany as far as he is involved in foreign business. Furthermore, it will interest the Englishman mainly by giving a view of the difference between the Anglo-Saxon Law and that of other countries. If there is a new tendency, in modern trade and commerce, of cooperation between nations, there must also be a modernization of the lawyer's profession as regards that tendency. Only the always up-to-date lawyer will be able to maintain the old tradition of his profession.

NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

California

California State Bar Puts Program Through Legislature

In the July, 1931, issue of the State Bar Journal President Leonard B. Slosson of the State Bar of California gives the following account of the notable success which attended the organization's efforts to get certain needed legislation at the last session of the Legislature:

"Now that the time for executive action on the bills passed at the recent session of the Legislature has expired, we may know what legislation affecting The State Bar or sponsored by it will become law on August 14th.

"First and most important is Assembly Bill 496, introduced by Assemblymen Little and Feigenbaum and permitting the Board of Governors, with the approval of the Supreme Court, to establish educational standards as qualifications for admission to the bar. It was signed by Governor Rolph on June 14th, in the presence of a considerable number of members of the bar. The act also gives the Board control of applicants for admission on certificates from other States.

"The ultimate effect of this legislation on the profession will be of considerable consequence. Applicants for admission to the number of a thousand or more are now taking the examinations each year. Increasing numbers are applying on certificates from other States. The educational standards when put into effect will reduce to some extent the flood of applications. The improvement of the standards of efficiency and conduct of the bar is, in my judgment, the most important thing to which the bar can apply itself. While it should not neglect to oppose the invasion of its proper field by other agencies, nevertheless the bar must improve its quality of service to the public or it will not succeed in holding the monopoly to which it is now entitled by law. One of the best ways to improve the service is in improving the quality of those admitted to practice.

"Senate Bill No. 185, introduced by Senator Rochester, was signed by the Governor. It provides for a continuation, for the time being, of the method of electing members of the Board of Governors from congressional districts as they existed at the time the State Bar Act went into effect.

"Assembly Bill No. 319, introduced by Assemblyman Cobb, defining cappers and prohibiting the solicitation of business for lawyers by cappers and others, was signed by the Governor. It will do much in helping to correct some scandalous conditions which are said to obtain in and about the jails in large cities and will be helpful in suppressing all forms of solicitation of business by members of the bar.

"Assembly Bills Nos. 1000 et seq., revising the corporation laws of the State, introduced by Assemblyman Feigenbaum, were signed with due ceremony by Governor Rolph on June 12th. These bills were the work of a committee of members of The State Bar and the result is a modernization of the corporate laws of the State. Henceforth it will not be necessary for organizers of corporations in California to go to other States to seek the benefits which the laws of those States provide and which our own have heretofore denied.

"Senate Bill No. 139, introduced by Senator McKinley, repealing section 633e of the Political Code, relating to insurance adjusters, was passed and signed by the Governor. The section was used by personal injury adjustment companies as authority for their activities, but the Supreme Court in a recent decision has held that a license issued under it does not authorize the ambulance-chasing arrangements with attorneys that The State Bar has been so actively opposing.

"An enormous amount of time has been spent on the part of individual members of the bar in the drafting of the bills above mentioned, and a great deal of time and effort were required to get the bills through the Legislature and finally signed. Numerous appearances by members of The State Bar were made before the committees of the Legislature to explain the purposes of the bills. The State Bar's committees and individual members who have done this work are entitled to the appreciation of their fellow-members.

"Two bills prepared by The State Bar committees affecting procedure on appeals and in inferior courts met with pronounced opposition in the Legislature and failed to get out of the committee to which they were assigned. All other bills sponsored by The State Bar were passed and received executive approval.

"A number of bills were introduced which the Board of Governors thought would seriously handicap The State Bar in its work if they became laws. Members of the Board therefore opposed these bills before the Judiciary Committees and they failed of passage. Assembly Bill No. 771, in its original form, was one of the bills opposed. It was amended in committee and as amended

was passed and signed by the Governor. It permits unsuccessful applicants for admission to see their examination papers and marks at The State Bar offices. It will probably result in a considerable additional burden to The State Bar office staff, but may be of some benefit to those who take the examinations and fail.

"It will be seen that the legislative program of The State Bar has been successfully carried through. It can now go forward with its plans for suppressing illegal practices and for improving the standards of conduct of its members."

Montana

HORACE S. DAVIS
President, Montana Bar Association

Montana Bar Association Holds Forty-Fifth Annual Meeting

The Forty-Fifth Annual Meeting of the Montana Bar Association was held at Hunter's Hot Springs, Montana, August 14 and 15, 1931. Some of the outstanding features of the meeting were the following addresses:

"Progress Made in Law Procedure During the Past Year," President Fred L. Gibson of Livingston, Montana.

"Co-operative Statutes and Decisions," Hon. Wm. G. Owens, Attorney, Federal Farm Board, Washington, D. C.

"Progress of the Bar Integration Idea," Walter Aitken, Bozeman, Montana.

"The Courts and Their Critics," Horace S. Davis, Billings, Montana.

"Laws and Legislation," by Hon. Lew L. Callaway, Chief Justice of the Supreme Court of Montana.

"Lawyers and Judges I Have Known," Judge O. F. Goddard, Billings, Montana.

"The Good of the Order," J. Bruce Kremer, Butte, Montana.

"Professional Efficiency," by A. N. Whitlock, Missoula, Montana.

"Taxation Problems," James F. O'Connor, Livingston, Montana.

"The World Court," by Charles Leaphart, Dean, Montana Law School, Livingston, Montana.

The following officers were elected for the coming year: Horace S. Davis, Billings, Mont., President; John N. McFarlane, Big Timber, Secretary.

The outstanding social feature of the meeting was the annual banquet and dance on Saturday evening, Aug. 15th.

ENOR K. MATSON, Secretary.

North Dakota

North Dakota Bar Holds Busy and Successful Meeting

The 1931 annual meeting at Jamestown was a success from every standpoint. Notwithstanding the severity of the "repression," the attendance was all that could be expected—129 lawyers and 38 ladies participating.

President Miser of the South Dakota Association, President Mitchell of the Minnesota Association, and President Boston of the American Bar Association were received with open arms, and deserved all of the good things said about them and most of the good things done to them, with the possible exception of the honorary membership donation.

The only regrets expressed concerning the general program resulted from the inability of Governor Shafer and former Assistant Attorney General Thorpe to attend and participate. The calls for the Governor's public appearance, by reason of his good nature, wit and oratory, are becoming so insistently frequent that he ought to be provided with aeroplane taxi facilities in order to permit him to answer a still larger proportion of those calls.

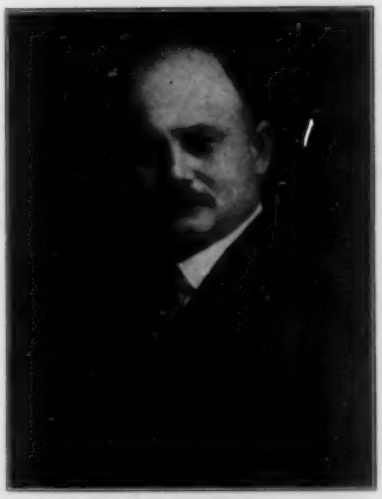
The banquet, as usual, was the main social feature, and was thoroughly enjoyed at Spiritwood Lake. It was unfortunate that the business sessions of the Association prevented many from getting out early enough to enjoy to the full the pleasure of this delightful summer resort.

Following is a summary of the major activities of the meeting:

The recommendation of the Committee on Constitution and By-Laws amending the resolution presented by that committee a year ago, was carried unanimously. Hereafter, therefore, the Executive Committee will be composed of the three elected officials (President, Vice President and Secretary) and the Presidents of the district organizations. The amendment made the change a little more definite, providing that the District Presidents should serve until the next annual meeting, and permits reorganization of the boundaries of the districts.

The report of the Internal Affairs Committee was referred to the Executive Committee for further consideration. It recommended that the jurisdiction, scope and powers of the committee be more definitely defined.

The Committee on Jurisprudence and Law Reform presented three matters



JOHN O. HANCHETT
President, North Dakota Bar Association

for consideration, to-wit: The Judge's charge to the jury before argument; opening statement to the jury by both parties before evidence is taken; and trial in adjoining counties to avoid delay. All three matters were referred to the district meetings for consideration and action.

Mr. Nilles, in his paper, recommended the preliminary questioning of jurors at the opening of the term concerning their corporate affiliations and connections in order to prevent the unfair presentation of the fact of insurance in personal injury cases. This was referred to the incoming Executive Committee for action.

The discussion on the report of the special committee on Unauthorized Practice of Law reached the "explosive" point several times. While that discussion may have gone further than was proper on several occasions, however, the "blow-off" probably did more good than harm. It certainly brought to light the very certain, definite and immediate problem that is facing some of our practitioners; and though "protection to the public" is and must remain the paramount issue involved in the report and the committee's recommendations, it is no longer possible to overlook the other involvements. The report, which was approved, provides for the appointment of a special committee of three by the President, with the concurrence of the Executive Commitee, with full power to institute the appropriate action, if deemed advisable.

John Knauf of Jamestown presented a resolution to request the employment of a majority of the members of the Law School faculty from the practicing attorneys of the State. If correctly informed by some of those who received advance copies of the resolution prior to the meeting, the original draft was quite unreasonable and objectionable. The draft presented seemed equally objectionable, although not quite so unreasonable in its phraseology. Tracy R. Bangs and H. A. Bronson, former "practitioner" members of the faculty,

pleaded more than argued against its adoption. Their pleas, eloquent and on a high plane, were effective in defeating the resolution.

A motion for special memorial services in the Supreme Court, for the deceased members of that Court, was referred to the Executive Committee for further consideration and action.

The reports of the Committees on Legislation and on Local Organization and Integrated Bar again presented the recommendations of a year ago. The recommendations are to transfer disciplinary powers to the Bar Association. The recommendation was approved, after considerable pro and con discussion, the record vote being 37 to 18.

B. F. Spalding, former Justice of the Supreme Court was master of ceremonies at the luncheon given for the pioneer lawyers, being presented by Judge S. E. Ellsworth. Judge John Burke, "Honest John," as he has been known for years, reminisced entertainingly, overlooking none of the pioneers present, including himself. The attending pioneers, in whose honor the luncheon was given, were: John Burke, Tracy R. Bangs, B. F. Spalding, John Wishek, L. N. Torson, J. M. Austin, James Campbell, and B. W. Shaw—not a large group, but surely pioneers.

The election of officers presented several contests, some bearing the stamp of "political" prearrangement, others arising on the "spur of the moment" and without notice. Harmony seemed to prevail after it was all over, all elections being made unanimous on motion. John O. Hanchett had the field all to himself for President, but the ballot could not be cast until the usual number and variety of seconding speeches had been placed on record. Judge W. H. Hutchinson of LaMoure, was elected Vice-President and Mr. R. E. Wenzel, Secretary-treasurer. The new Executive Committee is as follows: John O. Hanchett, President, Valley City, W. H. Hutchinson, Vice-President, LaMoure; R. E. Wenzel, Secretary-treasurer, Bismarck (12th election); Tracy R. Bangs, Grand Forks; J. J. Kehoe, Cando; H. L. Halvorson, Minot; H. P. Jacobson, Mott; C. L. Foster, Bismarck; Geo. M. McKenna, Napoleon.

The only invitation for the next meeting came from Bismarck. Fargo and Dickinson representatives, however, requested time to confer with other members at home, and will, doubtless, present invitations for the 1932 session.

We shall not, at this time, print the report of the Resolutions Committee. Mention should be made of that part dealing with the expression of appreciation for the courtesies extended by the Superintendent of the Hospital for the Insane, which included an excellent and highly appreciated lunch at noon of the second day, and the use of the Hospital Auditorium for the afternoon meeting. It may surprise some of the "natives" to discover that all members of the profession were permitted to depart without official escort.

May we say in closing, what was in the minds of those present, and only partly expressed, that President F. J. Traynor proved a worthy successor to A. M. Kvello, and the Association is better and stronger through his well-directed efforts the past year.

R. E. WENZEL, Secretary.

South Dakota

MATTHEW A. BROWN
President, South Dakota Bar Association

Integrated State Bar of South Dakota Holds Organization Meeting

The first annual meeting of the State Bar of South Dakota was held at Rapid City on August 20th and 21st. This was the organization meeting of the new Integrated Bar provided for by a law passed at the last session of the Legislature. The old South Dakota Bar Association held its 32nd and last annual meeting at the same time and place. Mr. Charles A. Boston, President of the American Bar Association addressed the meeting on the "American Bar Association and its Work," and Mr. Fred J. Traynor, President of the North Dakota Bar Association, spoke at the banquet on "Epochal Lawyers."

The following officers were elected: Matthew A. Brown, Chamberlain, President; Wiley W. Knight, Brookings, Vice President; Leonard A. Simons, Belle Fourche, treasurer; Karl Goldsmith, Pierre, Secretary.

Board of Bar Commissioners: First Circuit, Frederick D. Wicks, Scotland; Second, Alan Bogue, Parker; Third, Wiley W. Knight, Brookings; Fourth, Matthew A. Brown, Chamberlain; Fifth, James J. Fitzpatrick, Aberdeen; Sixth, Daniel J. O'Keeffe, Pierre; Seventh, Eben W. Martin, Hot Springs; Eighth, Chambers Kellar, Lead; Ninth, Max Royhl, Huron; Tenth, William M. Potts, Mobridge; Eleventh, Charles A. Davis, Burke; Twelfth, Frank Gladstone, Dupree; At Large: George J. Danforth, Sioux Falls; S. Wesley Clark, Redfield; Albert R. Denu, Rapid City.

KARL GOLDSMITH, Secretary.

Washington

Needed Reforms, Bar Integration, and Unlawful Practice of Law Among Matters Dealt With at Annual Meeting of Washington State Bar Association

President Glenn J. Fairbrook outlined a number of needed reforms in the administration of justice and stressed the duty of the legal profession in relation thereto; Hon. Joseph J. Webb, told of the experience of the integrated Bar in California; Dean Harold Shepherd, of the University of Washington Law School, told of new methods of teaching law; and Edward W. Hinton, of the University of Chicago, spoke on "Arbitration by Jury" at the annual meeting of the Washington State Bar Association held at Aberdeen on July 29, 30 and 31.

The members were welcomed by Mr. J. E. Stewart, President of the Grays Harbor Bar Association and the response was made by Mr. Sam Driver of Wenatchee. Executive Secretary Alfred J. Schweppe then presented his annual report, after which President Fairbrook delivered his address. The following extracts are taken from the account of the meeting in the Aberdeen World:

"The duty of the law profession to the public is three-fold. We must aid in law enforcement by pointing out and eliminating the reasons for present laxity; we must provide aid to business in the removal of obsolete laws which handicap it; and we must aid in the administration of justice.

"Present laxity in law enforcement is not caused by the legal profession. Some lawyers are unethical and do aid criminals in defeating the law, but the rank and file of the profession are doing all in their power to speed justice and correct antiquated methods. We should not permit the public to blame the legal profession for the laxity of law enforcement; on the other hand we should also study the defects of law administration and strive to eliminate them.

"Realizing the need of aiding in the problem of law enforcement, the association at the last session of the legislature attempted to secure the enactment of new legislation. One of our bills recommended the legalizing of issuing search warrants in felony cases. The famous Bassett case illustrated the need of such search warrants. Another bill would have allowed justice of peace warrants issued in one county to be served in another. A third gave the option to a trial judge to admit or deny bail to a person convicted of a felony. Because of improper organization at the legislature and improper presentation of these patently necessary laws, they failed to even be brought to a vote. It is even more vital we obtain such legislation in the future.

"Another matter which deserves our earnest consideration is that of jury verdicts in criminal cases. Why should it be necessary to have a vote of 12 jurors for conviction in criminal cases when such a verdict is not required in civil cases? Why should not the court be allowed to comment on the fact a defendant refuses to testify? Our criminal procedure needs revision on these points. Ten votes should be enough for a conviction in a criminal case, as shown

F. L. STOTLER
President, Washington Bar Association

in a very recent trial case in Seattle where a single juror caused a hung jury and will necessitate a retrial. The public feels something is wrong in such a system and we should take the lead in correcting it.

"As the public looks to us to correct criminal law procedure, so business looks to us to revise laws affecting business and property rights. It is our duty to provide relief for the appellate court, which is badly congested due to its great mass of business. We attempted to obtain necessary legislation at the last legislature, but because of poor presentation and divided opinion a proposal to allow the appointment of appellate court commissioners to take over some of the work and another eliminating the requirement for written opinions were defeated by close votes. We did secure passage of a law raising the jurisdictional amount on appeal cases.

"The speeding of cases in trial courts also is a necessity, particularly in the larger cities. Justice often is delayed because of crowded court calendars. We must protect the public from the unauthorized practice of law which is more and more creeping in. We should also protect ourselves against the inroads of those not admitted to the bar. To obtain these objectives we must maintain closer contacts and perfect a closer organization in our legislative efforts."

The regular committee reports were made, among them those on the unlawful practice of law and on uniform fees. Mr. Howard A. Adams, chairman of the former committee, declared that the association owed a duty to the Bar and the public to weed out lay persons and organizations who were attempting to practice law. The committee recommended that no attempt be made to secure a legislative definition of the practice of the law but that definition be left to the courts, and that the Association confine its effort to prosecuting either by criminal action or contempt of court those cases where it was felt that there was no doubt that unlawful practice was engaged in. The Association determined to cooperate with the American Bar Association and authorized the President to appoint a standing committee consisting of one member from each Congressional District to investigate unlawful practices and bring appropriate proceedings against the offenders.

Mr. Everett Smith, chairman of the committee on uniform fees, read its report, in which the opinion was expressed that such fees were impractical. Conditions in the different counties are not always similar and this would interfere seriously with the workability of any uniform fee plan. Such a plan would also give the unethical and "shyster" lawyers a chance to cut fees below the standard adopted. County organizations, the report pointed out, can adopt their own uniform fee schedules.

The committee on "Integration of the Bar" presented an exhaustive report with a draft of an act providing for an Integrated Bar. Inasmuch as there is no legislative session before the next annual meeting, the Association voted to submit the prepared bill to the local associations for discussion during the coming year, and to have the Association take final action at the annual meeting in 1932. Preceding the report of the committee, Hon. Joseph J. Webb, first president of the Integrated Bar of California, told the Association of the experiences of that state with the Integrated Bar and answered questions concerning its operation. The State Board of Bar Examiners was requested by the Association to study the plan and present a report as to the advisability of its adoption at next year's meeting.

In addition to the action taken on Unauthorized Practice and Integration of the Bar, the Association approved a recommendation of the Superior Court Judges that the Legislature appropriate necessary funds so that the Judicial Council might continue its work and also directed the trustees to take necessary action to procure such an appropriation from the Legislature and give suitable publicity to the work of the Council.

The outstanding social affairs of the meeting were: the Law School Alumni Banquet with Judge Calvin S. Hall of Seattle as Toastmaster and Bruce Shorts of Michigan, Laurance Peters of Yale, L. B. Stedman of Harvard and Hon. Dolph Barnett of the University of Washington responding on behalf of their respective Alma Maters; the Annual Bar Banquet with Scott Z. Henderson of Tacoma as Toastmaster and talks by Hon. James C. Wilson, Judge, United States District Court, Hon. Roy Raley, President of the Oregon Bar Association, Hon. Warren W. Tolman, Chief Justice of the Washington State Supreme Court. The principal entertainment features of the banquet were the singing of Dell Fradenburg, tenor, and the presentation of the Prosecutor's Report by Henry Herman of Spokane, who drew extensively on his imagination for suggestive reform in criminal procedure.

Officers elected for the coming year were: F. L. Stotler of Colfax, President, and Howard A. Adams, Seattle, Secretary. The president has announced appointment of the following as district vice-presidents and trustees: Frank P. Helsell, Seattle, First District; Tim Healy, Bellingham, Second District; Charles H. Paul, Longview, Third District; E. L. Casey, Walla Walla, Fourth District; W. B. Chandler, Spokane, Fifth District; L. R. Bonneville, Tacoma, Sixth District.

Preceding the meeting of the Association, the Superior Court Judges' Association and Prosecuting Attorneys' Association held their annual meetings. The prosecutors devoted a portion of their time to a consideration of the report of the State Bar committee on "Unauthorized Practice" and listened to the recommendations of the committee that criminal action be instituted in flagrant cases. At the conclusion of the discussion, the prosecutors voted to cooperate to the fullest extent with the State Bar.

HOWARD A. ADAMS, Secretary.

Pennsylvania

ROBERT VON MOSCHZISKER
President, Pennsylvania Bar Association

Pennsylvania Bar Creates Committee on Judiciary to Inquire and Report as to the Fitness of Candidates for Appointment or Election to Supreme or Superior Court

The thirty-seventh Annual Meeting of the Pennsylvania Bar Association was held at Bedford Springs, Pennsylvania, on Wednesday, Thursday and Friday, June 24, 25 and 26, 1931.

The afternoons of the three days were filled by the usual round of entertainments, consisting of golf and tennis tournaments for the men and golf, bridge and a Tea for the ladies.

The first day's morning meeting was opened with the President's address by John B. Brooks of Erie, followed by the reports of Committees, some of which were of much general interest. In his address, the President stressed what had been accomplished by the Association, not only during his term of office, but during the several years passed, and then called attention to and commented upon the outstanding piece of legislation adopted by the session of the Legislature just closed.

At the evening meeting on the first day, the Annual Address was delivered by Charles A. Boston, President of the American Bar Association.

At the second day's morning meeting, a paper on Legislation and the Effectiveness of the Law was read by Professor John Dickinson of the University of Pennsylvania Law School, after which the reports of the several committees were taken up for consideration.

As a result of the report of the Committee on Program, whose function it is to receive, consider and initiate suggestions of appropriate topics for consideration by the Association, the appointment of two new committees was authorized—one to study and report on the organization and cost of local government in Pennsylvania—the other on the practice of the law.

The most important matter considered as a result of the reports of committees was that of the special committee appointed last year, pursuant to the following resolution:

"Resolved, by the Pennsylvania Bar Association that a committee be appointed to investigate the matter of admission to the several county bars and report thereon at the 1931 meeting of the Association. Said Committee is to consider the conditions under which lawyers admitted to practice before the Supreme Court should be permitted to practice before the several county courts, contemporaneous practice in two or more counties, the advisability of uniform rules governing the admission to practice in several county courts of practitioners in other counties, the desirability of a Supreme Court rule governing the matter, the desirability of a statute governing the matter, the respective powers and functions of the Supreme Court, the lower Courts and the Legislature in the matter and such other matters as to the Committee shall seem appropriate; and that it do all that by 1931."

The report of this Committee was adopted after extensive consideration and discussion and the By-Laws amended so as to provide for a standing Committee of nfteen to be known as the Committee on Judiciary, whose duty it is to inquire from all sources as to the fitness of candidates for appointment or election to the Supreme Court, or the Superior Court, our two courts of appeal.

Under the plan as reported by the Committee, the Committee on Judiciary is required to set forth, after investigation, what it has been able to learn about the respective candidates, covering as to each one his age and a complete statement of his education, a short biographical summary, the character and extent of his practice, the place and period where he has served on the Bench, if any, a summary of facts that tend to show his qualification for judicial office, the fact of his refusal to give information, if such be the fact, and any other general information which would help the Governor in appointing, or the electors in electing a properly fitted Judge.

Pursuant to the authorization, the President has appointed as the Committee on Judiciary: Edward J. Fox of Northampton County, a former President of the Association, and a former Justice of the Supreme Court, as Chairman; A. M. Holding of Chester County, a former President of the Association; John B. Brooks of Erie County, a former President of the Association; Bernard J. Myers of Lancaster County, a former President of the Association; Roland S. Morris of Philadelphia, one time Ambassador to Japan; George T. Butler, Delaware County; William J. Kyle of Greene County; William J. Fitzgerald of Lackawanna County; Fred T. Fruit of Mercer County; Ralph B. Evans, of Philadelphia County; Arthur M. Scully, of Allegheny County; Edgar S. Richardson of Berks County; Harry A. Cottom of Fayette County; Franklin L. Wright of Montgomery County; R. H. Meloy of Washington County.

The Annual Banquet was held on the evening of the second day and was addressed by Mr. Boston, George Wharton Pepper, a former President of the Association and former United States Senator from Pennsylvania, and Owen J. Roberts, Justice of the Supreme Court of the United States.

At the morning meeting of the third day a paper was read by Judge Sara Soffel of the Allegheny County Court on the subject of the Sci. Fa. Act of 1929, by which a defendant in a trespass action may bring in by sci. fa. additional defendant or defendants liable with him or over to him. At this same meeting Robert von Moschzisker, who has recently finished his term as Chief Justice of Pennsylvania, was elected President for the ensuing year and Harold B. Beitler, was re-elected as Secretary.

The following were elected Vice Presidents for the ensuing year: First Zone, Francis Shunk Brown Jr., Philadelphia County; Second Zone, Fred B. Gernerd, Lehigh County; Third Zone, Simon P. Light, Lebanon County; Fourth Zone, R. S. Hemingway of Columbia; Fifth Zone, Cornelius Comegys of Lackawanna County; Sixth Zone, John H. Wilson, Butler County; Seventh Zone, H. M. Reimer, Clarion County; Eighth Zone, Robert H. Gilbert, Blair County.

This was one of the best attended meetings ever held by the Association. The consensus of opinion is that the year just closed has been one of the most successful in accomplishments, generally.

HAROLD B. BEITLER, Secretary.

Miscellaneous

Annual Meeting of Cincinnati Bar Association

At the annual meeting of the Cincinnati Bar Association Tuesday evening, April 28th, Hon. Joseph W. O'Hara of Cincinnati was elected as its new president, according to the *Ohio Bar Association Report* for April 28. Judge O'Hara was appointed to the Ohio Supreme Court to fill the vacancy created by the death of Judge James L. Price, and served from April 17 to December 20, 1912, declining renomination and election for that judgeship.

The Cincinnati Association also endorsed former Common Pleas Judge Walter A. Ryan for President of the Ohio State Bar Association. Judge Ryan represents the First Appellate District on the Executive Committee of the State Bar Association.

A resolution was adopted, opposing the Anderson Bill, regulating practice before the State Industrial Commission.

Other officers elected were: First Vice-President, John Weld Peck; Second Vice-President, Walter M. Shohl; Third Vice-President, Froome Morris; Fourth Vice-President, A. Julius Freiberg, and Treasurer, Philip Hinkle.

The meeting was addressed by Austin V. Cannon of Cleveland, who spoke upon "The Relation of the Bar to the Selection of Judges." His address dealt with the work of the Cleveland Bar Association in analyzing the qualifications of judicial candidates, conducting a referendum of the bar and informing the public of the endorsements of the Cleveland Association.

At a recent meeting of the Third District (Minn.) Bar Association, held at Lake Jefferson, the following officers were elected: J. P. O'Hara, Glencoe, President (re-elected); H. H. Bonniwell, Gaylord, Vice-President; O. S. Vesta, Arlington, Secretary.

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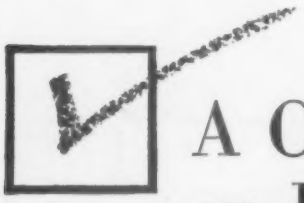
- ☐ Unknown Encumbrance
- ☐ Dower Claims
- ☐ Defective Foreclosure



A Case of an Invalid Deed

Over one hundred years ago, a man conveyed a parcel of real estate to trustees, who sold it by what was then believed to be a valid deed. But now, after a century, suits have been brought by his descendants to recover possession of the property on the grounds that the deed was invalid and conveyed no title.

Title insurance guards against loss from the many hidden, unsuspected liabilities which constantly threaten property ownership.

As a lawyer you know that even the most careful title search is not proof against human error. More and more, attorneys recognize the wisdom of advising clients who are buying or lending on real estate to insist that a title policy be included in the transaction.

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